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C. Party Def: The officer or other agency whose rule is involved shall be the Def

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K. Ct accords no deference to agency's interpretation of law on review of agency action or decision

L. Right of petitioner to challenge constitutionality of any act or its application to petitioner not foreclosed by fact that petitioner holds license, permit, or privilege under the act

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D. The findings of fact made by LIRC acting within its powers shall, in the absence of fraud, be conclusive

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D. No filing fee to be paid to Circuit Ct when filing Application

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2..... Summary Contempt

A. Defined as misconduct in presence of Ct, which interferes with a Ct proceeding or administration of justice or impairs the respect due the Ct

B. Dispenses with formality, delay, and disgression resulting from issuance of process, service of pleadings, hearing, evidence, arguments, briefs, etc.

C. Four requirements before Ct can impose summary contempt

D. Ct must make specific findings

E. Contemnor must be given right of allocution

F. Ct to impose sentence on record

3..... Non-Summary Remedial Contempt

A. Often used in family Ct proceedings. For a more detailed discussion in this context, see Family Benchbook FA 4

B. Purposes

C. Intent

D. Procedure

E. Sanctions

F. Contempt not allowed for failure to comply attributable to inability to comply

G. Must be purgeable

H. Violation of purge conditions

4..... Non-Summary Criminal Contempt

A. Sometimes referred to as Non-Summary Punitive Contempt

B. Initiated by criminal complaint by DA, AG, or Special Prosecutor

C. For a more detailed discussion see Criminal Benchbook CR 47

5..... Comparison of Summary and Non-Summary Contempt Procedures: Chart

CV 44: SECTION 1983 ACTIONS IN STATE COURT

1..... 42 USC § 1983

A. Definition

B. Purpose

2..... Jurisdiction

A. Jurisdiction: Concurrent/Federal and State

B. Subject-matter jurisdiction

C. Persons covered as Defs

D. Prerequisites to jurisdiction

3..... Cause of Action

A. Substantive Due Process: Gov’t deprivation of certain property or liberty interests is actionable regardless of fairness of procedures used

B. Procedural Due Process: Gov’t deprivation of life, property, or liberty interests is actionable only if lacking procedural fairness

C. Claim under equal protection

D. Conduct required

4..... Recovery

A. Compensatory damages

B. Punitive damages

C. Injunctive relief

D. Reasonable Atty fees

5..... Local Government Liability

A. Governmental body

B. Governmental official or employee

6..... Immunities and Defenses

A. Absolute immunity

B. Qualified immunity

C. Administrative res judicata/Estoppel by record—claim preclusion

D. Administrative collateral estoppel—issue preclusion

E. For discussion of prisoner litigation, see CV 45

CV 45: PRISONER LITIGATION

1..... Prison Litigation Reform Act (PLRA)

A. Purpose of State PLRA

B. Prisoner defined

C. PLRA exhaustion requirements

D. PLRA rules for prisoners who seek to proceed in forma pauperis

E. PLRA's mandatory screening of all civil prisoner litigation

F. Discovery

G. Mandatory release extensions

H. Hearings to be conducted electronically

I. Atty fees and costs; security for costs

J. If money judgment is awarded in favor of prisoner, numerous debts must be paid, in the order specified in paras. 1)–6) below, before any funds can be transferred to prisoner

2..... Pleadings by Self-Represented Litigants

A. Ct must construe pleadings by self-represented (pro se) litigants liberally

3..... Venue

A. Ct in Cty where action filed shall determine whether venue proper

B. Ct on its own motion shall change venue to more convenient Cty under § 801.52 if all of following answered in affirmative:

C. If receiving Ct believe error made, matter to be referred to Chief Judge

4..... Certiorari

A. Commencement of action

B. Sua sponte dismissal. See supra Sec. 1.E.2)

C. Three ways to commence. See CV 26, Sec. 4.C.

D. Traditional standards for certiorari. See CV 26, Sec. 5

E. Standard of review. See CV 26, Sec. 6.B.

F. Requirements for remedy. See CV 26, Sec. 6.C.

G. Remedy will not lie, when. See CV 26, Sec. 6.D.

H. Review of out-of-state prison discipline

I. Record on review

J. Standard of review

K. Review of disciplinary process

L. Review of the inmate complaint review system

M. Review of inmate's placement in temporary lockup

N. Review of inmate's placement in administrative confinement

O. Review of parole denial

P. Review of mandatory release date

Q. Deduction of restitution from inmate accounts

R. Remedies

5..... Mandamus

A. Exhaustion of administrative remedies required

B. Public records request (See CV 28, Sec. 8)

6..... Habeas Corpus

A. Habeas corpus used to review an administrative rule relating to criminal prosecution

B. Habeas corpus is proper remedy for inmate who seeks to shorten time of imprisonment, but not if inmate seeks transfer to less restricted form of custody

C. Not available when other adequate legal remedies exist

7..... Declaratory Judgment

A. Service upon the Joint Committee for Review of Administrative Rules

B. Prisoner must file notice of claim under § 893.82(3) when seeking declaratory judgment

C. PLRA exhaustion requirement trumps the declaratory judgment statute governing procedures for contesting the validity of administrative rules, even when constitutional challenge raised

8..... Injunctive Relief

A. No notice of claim, under § 893.82(3), required if Ct finds substantial risk to prisoner's health or safety

B. Temporary injunctions

C. Permanent injunctions and consent decrees

9..... Tort Claims Against State Actors

A. Inmate is required to serve a notice of claim under § 893.83(3)

B. Def must be specifically identified by name in the notice of claim

C. Exhaustion of administrative remedies required

D. Only liability when

E. Person liable only for his or her own torts; no respondeat superior in cases against State actors

F. Physical injury (or commission of a sexual act) must be proved

10..... Civil Rights Claims

A. Civil rights statutes

B. Concurrent jurisdiction of State Cts

C. Exhaustion of administrative remedies required

D. Immunity

E. Personal involvement

F. Retaliation

11..... Selected Civil Rights Issues

A. First Amendment

B. Fourth Amendment

C. Eighth Amendment

D. Fourteenth Amendment

E. Hunger Strike/Forced Feeding

F. Americans with Disabilities Act (ADA) and Rehabilitation Act

12..... John Doe

A. For a general discussion of John Doe procedures, see CR 48 in the Criminal Benchbook

B. A John Doe petition is not a "civil action or special proceeding," so the requirements of the PLRA do not apply

C. Standard for referring a prisoner's John Doe petition to the DA is discussed in Naseer

13..... Public Health/Clemency Requests

A. The DOC is responsible for running state correctional facilities. The Ct is not

B. Prisoners may challenge the conditions of their confinement by appropriate writs, such as habeas corpus

C. Motions for sentence modification are not the appropriate vehicle to challenge conditions of confinement

D. A Ct's inherent authority to review its sentence to determine whether it is "unduly harsh" does not include the authority to reduce a sentence based on events that occurred after sentencing

E. Events occurring after sentencing would be governed by "new factor" analysis. One possible consideration: does the later event frustrate the purpose of the sentence?

14..... Deductions from Inmate Accounts

A. DOC must deduct an amount it determines to be reasonable from an inmate's wages and from other moneys held in the inmate's account for all Ct-ordered restitution

B. Gifts are part of other moneys held in the inmate's account

C. Ct-ordered costs and surcharges are generally combined with restitution in this withholding process

CV 46: DECLARATORY JUDGMENTS

1..... Scope of Declaratory Judgments

A. Ct has power to declare rights, status, and other legal relations whether or not relief is or could be claimed

B. Rendering declaratory judgment is discretionary

C. Declarations shall have force and effect of final judgment or decree

D. Sec. 806.04 is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered

2..... Four Requisites for Declaratory Judgment

A. Justiciable controversy must exist

B. Controversy must be between persons whose interests are adverse

C. Plaintiff must have legally protectable interest in the controversy

D. Issue must be ripe for determination

3..... Bringing a Declaratory Judgment

A. Venue. See CV 30, Sec. 1, for venue in declaratory-judgment actions challenging validity of administrative rules

B. Declaratory-judgment action may be brought in the following circumstances

C. Declaratory-judgment action may NOT be brought

4..... Procedure

A. Ct may refuse to render or enter declaratory judgment or decree

B. Jury trial permissible

C. Parties and persons entitled to be heard

5..... Standard of Review

A. Decision to grant or deny declaratory relief falls within discretion of Circuit Ct and will not be overturned unless erroneous exercise of discretion

B. But Circuit Ct's decision to grant summary judgment for lack of ripeness is reviewed under de novo standard

CV 47: SECTION 102.29 (THIRD-PARTY) ACTIONS

1..... Nature of the Third-Party Claims

A. General Rule

B. Exception—§ 102.29

C. Potential third-party Defs include

D. Elements of § 102.29 claim

E. Employer and compensation insurer granted limited right of reimbursement from proceeds of employee's third-party action

F. Making a claim against an employer or compensation insurer under Ch 102 does not affect right of employee, employee's representative, etc., to bring third-party action

G. In making a third-party claim, each party to give to the other reasonable notice and opportunity to join in making of such claim

H. Each party to have voice in prosecution of the claim with any disputes settled by Ct

2..... Section 102.29 Formula

A. Absent an agreement to the contrary, proceeds of a third-party action in a worker's compensation case must be allocated according to § 102.29(1)

B. Deduct reasonable collection costs

C. 1/3 of remainder to employee or "employee's personal representative or other person entitled to bring action"

D. Reimburse worker's compensation payer for payments made or obligated to be made

E. Pay balance to employee or "employee's personal representative or other person entitled to bring action"

3..... Damages Subject to Division Under § 102.29

A. Damages for pain and suffering

B. Damages for aggravation of preexisting injury

C. Pecuniary damages for wrongful death

D. Damages for medical malpractice in treatment of compensable injury

E. Damages recovered from third-party manufacturer of product used in treatment of compensable injury

4..... Damages Not Subject to Division Under § 102.29

A. Loss of society and companionship and financial support

B. Legal malpractice in prosecuting third-party action under § 102.29

C. Uninsured motorist coverage proceeds

5..... Competing Claims

A. When proceeds are insufficient to cover competing claims, one falling under § 102.29(1) and the other not, division made as follows

6..... Reimbursement of Payments to State Treasury

A. Employer or insurer liable to make payment into State treasury has right to maintain action against a negligent third party

7..... Settlements

A. Settlement of any third-party claim shall be void unless settlement and distribution approved by Ct

B. Failure by worker's compensation insurer to appear at hearing to approve distribution of settlement proceeds constitutes waiver of its right to object to amount or terms of settlement

C. Upon worker's comp insurer's motion, Ct may approve settlement of third-party claim over employee's objection

8..... Common Insurer Conflicts

CV 48: INSURANCE QUESTIONS

1..... Construction of Insurance Policies

A. Standards

B. Exclusions

C. Concurrent liability coverage

D. Omnibus coverage

E. Policy limits

2..... Duty to Defend

A. Tender of defense sufficient if insurer has notice of claim—specific request for defense not required

B. Duty determined by comparing allegations of complaint to terms of insurance policy

C. Standards for determining duty

D. Insurer that defends insured without reserving its rights waives all policy defenses "if it has exercised its dominion over the case at an important point"

E. Breach of duty

F. Withdrawal of defense

3..... Separating Coverage Issues from Liability Issues

A. Insured has initial burden to show coverage, while insurer has burden of proving an exception to coverage

B. Ct may bifurcate trial

C. Summary judgment or declaratory judgment an appropriate method to determine coverage

D. Consider stay of proceedings on liability until coverage issue resolved

4..... Liability Insurance and Damages

A. Damages covered

B. Environmental remediation damages

C. Punitive damages

D. Statutorily imposed treble damages are covered under a standard liability insurance policy

5..... Bad Faith by Insurer

A. Claim for benefits and claim for bad faith should be tried separately to avoid prejudice and jury confusion

B. Insured may file first-party bad-faith claim without also filing breach-of-contract claim, but may not proceed with discovery unless satisfies Ct that breach occurred

C. Damages for bad faith by insurer (includes HMOs)

6..... Pierringer Release

A. Purpose

B. Elements

C. Caution

D. Effect of settlement at trial

E. Variant on Pierringer—The Loy release

7..... Uninsured Motorist Coverage (UM)
A. Purpose
B. Every insurance policy, excluding umbrella and excess liability policies, must provide
C. When there are two or more policies
D. Characteristics of UM coverage
E. Validity of exclusions
F. Stacking coverage—"Anti-Stacking" and Reducing Clause Rules
8..... Underinsured Motorist Coverage (UIM)
A. Purpose and requirements
B. Definition
C. Determination of coverage
D. UIM coverage is not personal and not portable
E. Anti-Stacking or Reducing Clause Rules, see Sec. 7.F., supra
9..... Collateral Source Rule
A. In general
B. Benefits subject to collateral source rule
C. Circumstances in which collateral source rule does not apply
10..... Subrogation
A. Nature of claim
B. Subrogated carrier as party to action
C. Effect on plaintiff for failure to join a subrogated carrier
D. When statute of limitation has run as to subrogated carrier's claim
E. Effect on Def when subrogated carrier not named as party
F. Effect of settlement on subrogation right
G. Subrogation rights of Injured Patients and Families Compensation Fund
H. Common-law subrogation principles inapplicable in three areas
CV 49: BANKRUPTCY AND RECEIVERSHIP OVERVIEW
BANKRUPTCY
1..... Introduction
A. Constitutional authority
B. Definitions (see also Bankruptcy Terms in Sec. 7, infra)
C. Four primary types of proceedings
D. Creditors may invoke involuntary bankruptcy against a debtor
E. Conversion from one chapter to another
2..... Jurisdiction of the Bankruptcy Court
A. District Cts have original and exclusive jurisdiction of all cases under title 11 of the U.S. Code
B. District Cts have original, but not exclusive jurisdiction over all civil proceedings arising under title 11
C. Removal to Bankruptcy Ct
D. The estate

3..... Property of the Bankruptcy Estate

A. Property included in estate is extensive

B. Individual debtors may exempt property for a fresh start

C. Secured creditors are protected by their liens

4..... Role of the Trustee

A. Trustee has many of the same powers given to a receiver under Wis Stat Ch 128, plus more. Trustee has powers of a hypothetical lien creditor or bona fide purchaser with strong-arm powers that are to be used to marshal assets for creditors' benefit

B. Trustee is entitled to move Bankruptcy Ct or begin an "adversary proceeding"—akin to a trial within the bankruptcy case—to exercise strong-arm powers to

C. Abandonment of estate property by trustee

D. Trustee may deal with executory contracts and unexpired leases of debtor if value for estate exists

E. Role of the Trustee in Ch 13 and Subch V of Ch 11 varies

5..... The Automatic Stay

A. Effect of stay

B. Items not affected by stay

C. Duration of stay

D. Relief from stay/adequate protection

6..... Discharge/Dischargeability of Debt

A. Discharge—Relief from debts

B. Objection to dischargeability of debt

7..... Bankruptcy Terms

A. Abandonment. A disclaimer of any interest by the trustee or debtor in burdensome or inconsequential property. Once property has been "abandoned," it is no longer property of the estate, and parties with a security interest in the property may proceed against it

B. Abstention. A Bankruptcy Ct may abstain from hearing a particular civil proceeding on the finding that it is in the interest of justice or in the interest of comity with State Cts or state law. A Bankruptcy Ct must abstain from a hearing involving a non-core proceeding based on a cause created by state law, when the cause is actually pending and can be timely adjudicated in a forum of appropriate jurisdiction. The Bankruptcy Ct may abstain from hearing an entire bankruptcy case on the finding that the interest of both creditors and the debtor will be served by dismissal of the petition

C. Automatic Stay. The filing of a voluntary, joint, or involuntary petition under any chapter of the Bankruptcy Code automatically operates as a stay against the commencement or continuation of most judicial, administrative, or other proceedings against the debtor or the debtor's estate. The purposes of the stay are to give the debtor under 11 USC Ch 11, 11 USC Ch 12, or 11 USC Ch 13 "breathing time" for rehabilitation; to give the Chapter 7 trustee the protection necessary for administering the assets of the estate; to relieve the Chapter 7 debtor from the pressure of creditor collection efforts. The law provides a number of exceptions to this general rule. A party seeking relief from the automatic stay must file a motion to lift the stay

D. Avoidance Power. The Bankruptcy Code grants the trustee the power to avoid certain transactions or transfers occurring before the commencement of the case, including preferences and fraudulent conveyances

E. Chapters of the Bankruptcy Code

F. Claim. Any right to payment, as well as any right to an equitable remedy for breach of performance if that breach also gives right to payment

G. Confirmation. The process by which the bankruptcy judge approves a plan of reorganization of a debtor

H. Core Proceedings. Proceedings arising under Title 11 or arising in a case under Title 11 in which the bankruptcy judge may conduct the entire proceeding and may enter the final and dispositive order or judgment

I. Cramdown. One of two methods by which a debtor can confirm its Chapter 11 plan. Creditors may consent to the debtor's plan, or the debtor may "cram down" a plan over the objections of creditors when at least one class of impaired claims or interests have voted in the requisite number and amount to accept the plan, and certain other requirements are met with respect to all non-consenting impaired classes or claims or interests. In a proceeding under 11 USC Ch 13, cramdown may be used to reduce a creditor's secured claim to the value of its collateral, but does not apply when collateral is only a lien on the debtor's residence or certain vehicles purchased within 910 days before the bankruptcy filing

J. Creditors' Committee. A group of unsecured creditors appointed by the U.S. Trustee to represent the interests of all unsecured creditors before the Ct. The committee may retain counsel and other professionals at the expense of the estate to be heard in a wide range of matters

K. Debtor. The individual or entity that seeks voluntary relief under the Bankruptcy Code, or has been forced involuntarily into a bankruptcy case under 11 USC Ch 7 or 11 USC Ch 11 by petitioning creditors

L. Debtor in Possession. A debtor, under 11 USC Ch 11 or 11 USC Ch 12, that operates its own business, and remains in possession of its assets and property. For cause, the bankruptcy judge may order that the debtor in possession be replaced by a trustee appointed by the U.S. Trustee

M. Discharge. An order that relieves the debtor's in personam liability on claims within its scope, and acts as a permanent injunction against judicial proceedings or nonjudicial collection efforts with respect to such claims

N. Estate. Created by the filing of a voluntary, joint, or involuntary petition and consisting of all the debtor's legal and equitable interest in property as of the commencement of the case. An individual debtor is able to exempt certain property from the estate. Property of the estate also does not include (1) any power that a debtor can exercise for someone else's benefit; and (2) traditional spendthrift trust interests required by state law. The Estate is administered by a debtor, a debtor in possession, or a trustee

O. Examiner. An individual who may be appointed by the Bankruptcy Ct with duties limited to conducting an investigation of specified acts and business affairs of the debtor in possession. The appointment of an Examiner does not change the status of a debtor as a debtor in possession who remains in control of the property of the estate during the bankruptcy case under 11 USC Ch 11

P. Executory Contract. A contract under which the obligations of both the debtor and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other. The Bankruptcy Code grants the trustee the ability to assume, assign, or reject executory contracts and unexpired leases for the benefit of the estate, subject to Bankruptcy Ct approval

Q. Exemptions. A debtor's claims that protect certain property by removing it from the bankruptcy estate. The debtor retains exempt property, or the cash equivalent if the property is sold, free from the claims of its unsecured creditors

R. Fraudulent Conveyance. A transfer that can be avoided by the trustee if the transfer was made with (1) actual fraud evidenced by an intent to defraud, hinder, or delay creditors; or (2) constructive fraud, evidenced by the debtor's receipt of less than reasonably equivalent value in exchange for the transfer

S. No Asset Case. A case without sufficient nonexempt, non–fully encumbered assets to potentially provide a distribution to unsecured creditors

T. Objection to Claim. The filing of an objection to a claim initiates a process that will ultimately result in the allowance or disallowance of that claim by the Bankruptcy Ct

U. Petition

V. Plan of Reorganization. The document the debtor submits for confirmation to restructure and perhaps forgive certain pre-petition debt. The debtor proposes plans in 11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13

W. Preference. A transfer of the debtor's property to or for the benefit of a creditor, for or on account of an antecedent debt, made while the debtor was insolvent, within 90 days before bankruptcy (or within one year before the petition was filed in an "insider" situation), and the effect of which was to give the creditor more than the creditor would have otherwise received in a distribution under 11 USC Ch 7. The trustee's power to avoid preferences is designed to achieve the policy of fostering equality of distribution among the creditors of an insolvent debtor

X. Priority Claim. Unsecured claims entitled to priority and distribution over other unsecured claims, including unsecured claims for domestic support obligations; administrative expenses; claims arising in the ordinary course of the debtor's business after the filing of an involuntary petition and before the entry of the order for relief; certain wage, salary, or commission claims; certain contributions to employee benefit plans; certain claims of farmers and fishermen; certain consumer claims of up to $3,350; and certain unsecured tax claims

Y. Proof of Claim. Document a creditor files, together with all supporting evidence of such claim, including documentation reflecting perfection of a security interest, if any. There is usually a deadline in which to file a Proof of Claim. In cases under 11 USC Ch 12 and 11 USC Ch 13, creditors should file claims by the deadline (stated in the Notice from the clerk) and as early as possible. In cases under 11 USC Ch 7 and 11 USC Ch 11, the debtor or trustee will send a separate Claims Bar Date Notice. The claim filing deadline is almost absolute

Z. Reaffirmation—When debtor agrees to enter into an agreement with a creditor whereby a particular debt survives the bankruptcy case and is excluded from debtor's discharge. Most often seen with small business debts and some vehicles, when debtor reaffirms (and the parties follow the process in the bankruptcy Ct for making the reaffirmation agreement enforceable). The creditor retains the right to pursue the debtor personally upon default rather than just enforce its lien rights

AA. Redemption. When an individual debtor reclaims property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if the property is exempt, or has been abandoned, by paying the lienholder the amount of the allowed secured claim of the lienholder that is secured by such lien. Redemption must be a cash transaction, unless the creditor consents to pay out over time

BB. Removal. Process by which either Def or plaintiff may transfer a civil action in a non-bankruptcy forum involving the debtor and the District Ct (and by the standing order of reference to the Bankruptcy Ct)

8..... Questions Commonly Asked by State Court Judges

A. What sort of actions, motions, and proceedings in State Ct are not stayed by the filing of a bankruptcy?

B. Can a State Ct Judge act in violation of the bankruptcy stay?

C. In a lawsuit before me, three Defs are alleged to be joint tortfeasors. State law provides for percentage apportionment of liability. One of the three Defs files bankruptcy.

D. A Def in a tort suit files bankruptcy. All parties acknowledge that Defs are covered by insurance, and that the liability of the Def will be limited by the extent of this coverage. Do I need a Bankruptcy Ct order to proceed with this case?

E. (1) Can Bankruptcy Ct reexamine or undo my awards of child support, alimony, or Atty fees in a divorce action?

F. (1) Once a party to a case before me has filed bankruptcy, can the Bankruptcy Ct remove the entire case or part of the case to its jurisdiction for determination?

G. (1) Other than judgments for alimony and child support, what specific State Ct judgments are truly nondischargeable under the different Bankruptcy Code chapters?

H. If a debtor files a petition under 11 USC Ch 13, even judgments for embezzlement, fraud, intentional torts, and drunk driving can be discharged. Is this true?

I. (1) Are there any circumstances under which restitution or fines in a criminal case are dischargeable?

J. The Def in a collection suit before me affirmatively alleges discharge in bankruptcy. Shall I resolve this issue, or is the dischargeability issue only within the jurisdiction of the Bankruptcy Ct?

K. A lawyer for a party calls and advises me that a client has filed bankruptcy. How do I verify this?

L. When will a Bankruptcy Ct review my decisions?

RECEIVERSHIPS

1..... Receiverships Are Drastic Proceedings

A. Receiverships remove control from the individual or company and place it in the hands of a third party

B. Affairs are administered under direction of Ct

C. Party's property is sequestered and referred to as the "receivership estate"

2..... Receivers: In General

A. Officers of the Ct, wholly answerable to the Ct, extension of the Ct's powers

B. Must be qualified to serve, either as an Atty or another professional. Ch 128 receivers must be residents of Wis

C. Serve as fiduciaries to the receivership estate and all parties with an interest in the estate

D. Appointment is in the discretion of the Ct

3..... Types of Receivers

A. Ch 128—Business

B. Ch 813—Pendente lite (while the action is pending)

C. Sec. 816.04—"Selfish"

D. Ch 128—Individual

4..... Process

A. Voluntary Ch 128 cases can be filed by the debtor/"assignor" after an assignment to an intended receiver ("assignee")

B. Except in involuntary Ch 128 cases, begins with petition

C. Granted on an ex parte basis only in the most extreme circumstances and if "proper showing that notice might frustrate the proceedings by allowing the debtor to conceal or waste his assets. In such case the debtor may always subsequently challenge the appointment"

5..... Chapter 128 Receiverships—Business

A. Goal: orderly recovery, liquidation, and distribution of debtor's nonexempt assets in accordance with priorities of the creditors

B. Guidance for Ch 128 cases

C. Can be voluntary or involuntary

D. Language of the order appointing receiver is key. Orders can be very long and provide for the process of the case. Some receivers prefer separate case management order

E. Title to all of debtor's nonexempt assets vests in receiver

F. Receiver often files a motion to allow the receiver to use the secured creditor's collateral—cash, accounts receivable, inventory—and even to borrow new money to pay for operations and to fund the case (including receiver's fees)

G. Creditors are enjoined from collection

H. Receiver may, but is not required to, operate the business

I. Receiver has power to sell receivership assets

J. Statute requires debtor to file an inventory of assets and list of creditors within 10 days after the receiver's appointment. Often does not happen because of the receiver's possession of books and records and because of the debtor's practical inability to comply

K. Avoidance actions

L. Statute provides for process of filing proofs of claim and objections to the claims

M. Statute provides for orderly distributions

N. Bankruptcy may end receiverships

6..... Wis. Stat. Ch. 813—Pendente Lite

A. Take possession of property to preserve and maintain it during the pending litigation. Generally, receiver does not sell assets

B. Fiduciary duty to all parties

C. Common in foreclosure cases

D. A receiver owes a fiduciary duty to the debtor and its unpaid creditors not to deal with receivership property to benefit receiver at debtor's expense

E. A receiver may be appointed "[w]hen a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights." See also § 180.1432(1) ("A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate the business and affairs of the corporation.")

7..... Wis. Stat. § 816.04—"Selfish" Receiver

A. Receiver is a collection agent for a specific judgment creditor

B. Does not owe a fiduciary duty to other creditors, but does owe a duty to the judgment debtor. See also § 813.16(2), (3) (stating that Ct may appoint a receiver by or after the judgment to carry the judgment into effect, in action by a judgment creditor under Ch 816)

C. "A receiver in aid of execution is authorized to collect those assets revealed by the examination of the debtor, take possession of them, apply them to the satisfaction of the judgment, and return the excess to the judgment debtor"

D. A Ch 816 receiver can sell the debtor's property

E. Receiver may not operate the debtor's business as a going concern

F. Receiver's lien

8..... Chapter 128 Receiverships—Individual

A. Similar to a Ch 13 wage earner plan

B. A person with wages or salary files a petition listing creditors who have levied execution, attachment, or garnishment

C. Filing stays collection actions for creditors named in petition

D. Debtor proposes plan to pay creditors over three years

E. Receiver is appointed to meet with debtor and creditors, report to the Ct whether a plan is feasible, and administer payments under the plan

CV 50: SERVICEMEMBERS CIVIL RELIEF ACT

1..... Definition

A. Congressional legislation created to provide protection for those serving in the armed forces

2..... Purpose

A. To provide for, strengthen, and expedite national defense through protection extended by Servicemembers Civil Relief Act (SCRA) to US servicemembers (SMs) to enable them to devote their entire energy to nation's defense needs; and

B. To provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during military service

3..... Procedure

A. The following flow charts and checklist regarding the SCRA were prepared by Atty Mark E. Sullivan and reprinted with his permission. Additional information can be found at https://www.americanbar.org/groups/family_law/committees/military

CV 51: CLASS ACTIONS

1..... Generally

A. Purpose of class action: judicial economy and financial economy for all parties

B. Class-action rules rewritten and became effective July 1, 2018

C. Rules written to "track[] as closely as possible" FRCP 23 so that Wis Cts can seek guidance from "well-developed body of federal case law interpreting" FRCP 23

D. Sec. 803.08 varies from FRCP in only two material ways

2..... Judicial Tasks Typical in Class Actions That Are Not Typical in Other Civil Proceedings

A. Certify class action

B. Appoint class representative and class counsel

C. Ensure notice to class members and potential class members

D. Approve settlement

E. Approve Atty fees

F. Disburse residual settlement funds

3..... Class Certification

A. Procedure

B. Prerequisites for all class actions

C. Additional prerequisites for certain class actions

4..... Appoint Class Representatives and Class Counsel

A. Order certifying class must appoint class counsel

B. Class counsel must fairly and adequately represent interests of class

C. In appointing class counsel, Ct must consider

D. In addition, Ct may consider any other matter pertinent to ability to fairly and adequately represent interests of class

E. If more than one group of lawyers applies to serve as class counsel, Ct must approve group that is best able to represent interests of class

5..... Ensure Notice to Class Members and Potential Class Members

A. Class members must be notified when

B. Notice standards

6..... Approve Settlement

A. Claims may be settled only with Ct's approval

B. Procedure

C. Standards for approval

7..... Approve Atty Fees and Nontaxable Costs

A. Ct must approve claims for Atty fees and nontaxable costs if governed by settlement agreement or statute

B. Procedure

C. Standards for approval

8..... Disburse Residual Settlement Funds

A. "Residual funds" are unclaimed funds that remain after all class members have claimed their awards and after all expenses, litigation costs, Atty fees, and other Ct-approved disbursements have been made

B. Order approving "judgment" or "compromise" that establishes a process for identifying and compensating class members also must provide for disbursement of residual funds

C. Residual funds disbursed as follows:

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For online access to a master index of topics discussed in the Wisconsin Judicial Benchbooks, please go to https://booksunbound.wisbar.org/w/wisbar/AE0025-MASTER.INDEX.

Volume II

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CV 26: CERTIORARI

Note: Different rules apply throughout to certiorari actions brought by prisoners. See **CV 45**

1. Definition

St ex rel Gaster
v Whitcher
117 Wis. 668 (1903)
14 CJS *Certiorari* §§ 1, 2
(2017)

A. Extraordinary remedy by which Cts exercise supervisory control over inferior tribunals and quasi-judicial bodies and officers

Mills v Vilas Cty
Bd of Adjustments
2003 WI App 66, ¶ 15
261 Wis. 2d 598

Issuance of certiorari gives Ct exclusive jurisdiction over dispute, thereby precluding any future agency action until Ct has relinquished jurisdiction

Winkelman v
Town of Delafield
2000 WI App 254
239 Wis. 2d 542

B. Certiorari only tests regularity of proceedings before administrative body and cannot be used to compel action

Guerrero v City of
Kenosha Hous Auth
2011 WI App 138
337 Wis. 2d 484

1) Equitable relief is not available

2) Damages are not available

St ex rel Kulike
v Town Clerk
132 Wis. 103 (1907)

C. Proper Party

Acevedo v City of
Kenosha
2011 WI App 10, ¶ 17
331 Wis. 2d 218

1) Writ of certiorari must go to the Bd or body whose acts are to be reviewed; otherwise, the Ct cannot obtain jurisdiction either of the subject matter or persons composing the Bd

2) Exceptions

a. Specific statute provides otherwise

Weber v Dodge Cty Planning & Dev Dep't
231 Wis. 2d 222
(Ct. App. 1999)

b. Ambiguous statutory service requirements together with absence of clear identity of Bd or body

Koenig v Pierce Cty Dept of Human Servs
2016 WI App 23, ¶ 30
367 Wis. 2d 633

c. Examples include a panel that has no formal name or clear statutory identity or that does not appear to be a continuing entity

Cty of Sauk v Trager
118 Wis. 2d 204 (1984)
Nodell Inv Corp v City of Glendale
78 Wis. 2d 416 (1977)
Metz v Veterinary Examining Bd
2007 WI App 220
305 Wis. 2d 788

D. Generally requires exhaustion of administrative remedies

1) Ct need not apply doctrine when a good reason exists

2) Good reasons:

Kmiec v Town of Spider Lake
60 Wis. 2d 640 (1973)

a. Administrative body does not have authority to provide remedy sought

Cty of Sauk v Trager
118 Wis. 2d 204 (1984)

b. Party who failed to exhaust would have no judicial review in circumstances that would be harsh or unfair

Benson v Gates
188 Wis. 2d 389
(Ct. App. 1994)

c. Agency has already informed party of its position on question of law and facts are not disputed

2. Purpose

St ex rel Milw Med Coll v Chittenden

127 Wis. 468 (1906)
14 CJS *Certiorari* §§ 1, 2
(2017)

A. Allows Ct to examine record underlying final quasi-judicial determination to review questions of jurisdiction

Voters with Facts v
City of Eau Claire
2018 WI 63, ¶ 5
382 Wis. 2d 1
Donaldson v
Bd of Comm'rs
2004 WI 67
272 Wis. 2d 146

B. Agency's or municipality's legislative decisions may be reviewed in limited circumstances, such as when there are no statutory provisions for judicial review of legality of municipality's legislative decision

3. Jurisdiction

Wis Const art VII, § 8
§ 753.03
§ 781.01

A. Within general jurisdiction of Circuit Ct

St ex rel Kulike
v Town Clerk
132 Wis. 103, 105 (1907)
Acevedo v
City of Kenosha
2011 WI App 10
332 Wis. 2d 218

B. Failure to direct writ to Bd or body whose acts are to be reviewed may result in loss of personal and subject-matter jurisdiction

State ex rel Kaczkowski
v Bd of Fire & Police
Comm'rs
33 Wis. 2d 488,
496 (1967)

C. Certiorari not available when exclusive statutory procedure for judicial review exists

4. Commencement

A. Three procedures for certiorari

1) Non-writ procedure

§ 781.01

a. Remedy of certiorari available as interim or final relief in action or proceeding governed by rules of civil procedure without use of writ

§ 781.01

- Use of non-writ procedure does not alter nature of remedy or scope of proceedings

Bergstrom v Polk Cty
2011 WI App 20
331 Wis. 2d 678

b. Personal service requirements of § 801.11 must be complied with

- Special circumstances exception for service does not apply in certiorari action commenced by summons and complaint

c. Temporary relief

§ 781.02

- Plaintiff may request temporary relief by motion

§ 781.02

- Procedure for motion requesting temporary relief governed by § 801.15(4), except

— Ct may rule ex parte on motion, if plaintiff establishes an emergency exists

d. Transmittal of record

§ 781.03(1)

- Def must transfer record to be reviewed to Clerk of Ct in which action is pending, or

§ 781.03(1)

- Def must notify person in possession of record to be reviewed to transfer record to Clerk of Ct in which action is pending

§ 781.03(2)

- If petitioner is incarcerated, see **CV 45**

St ex rel McMillian v Dickey
132 Wis. 2d 266, 279 (Ct. App. 1986)

- Failure to transmit complete record remedied by contempt, mandamus, or habeas corpus

2) Writ procedure

a. Pleadings

St ex rel Anderton v Sommers
242 Wis. 484 (1943)

- Petition and supporting memorandum filed in Ct with supervisory jurisdiction

Durkin v Bd of Police & Fire Comm'rs
48 Wis. 2d 112, 118–19 (1970)

- Improper caption is formal defect that may be cured by amendment, provided

  — Original pleadings are sufficient to invoke jurisdiction of Circuit Ct

  — Opposing party had notice of issues to be determined

  — Objections to regularity of appeal waived by opposing party's participation in proceedings

St ex rel A Hynek & Sons v Bd of Appeals 267 Wis. 309, 315b (1954)

- Every jurisdictional defect on which petitioner intends to rely must be set forth in petition

- Ct may order response and hearing

  — Return to certiorari may be enforced by proceedings as for contempt

  — Failure to respond does not admit allegations of petition

b. Allowance of writ

§ 757.675(2)(c)

- Writ may be allowed by Supplemental Ct Comm'r

  — Returnable to a Judge

  — Returnable at a time set by Judge or Judge's clerk

St ex rel Chicago & NW Ry v Burnell 102 Wis. 232 (1899)

- Allowance of writ does not vacate decision challenged, but suspends execution of decision

St ex rel City of Sheboygan v Bd of Supervisors 194 Wis. 456, 462 (1928)

- If execution is already in progress, execution is not stayed, unless order to that effect is made by Ct issuing writ

  — May require bond

§ 753.04

c. Form of writ

- In name of State
- Date of issue
- Attested in name of Judge
- Returnable on day certain within 60 days, unless otherwise directed by law, rule of Ct, or Judge
- May be addressed to clerk of Cty, town, city, or village, if record is in clerk's official custody

d. Return to writ

St ex rel City of Augusta v Losby 115 Wis. 57 (1902)

- Return is production of official record in its entirety or certified copy of it

St ex rel Grant Sch Dist v School Bd 4 Wis. 2d 499 (1958)
Nehrling v St ex rel Thal 112 Wis. 637 (1902)

- No extraneous evidence, affidavits, or proofs are admissible to supplement or impeach official record

§ 802.05
St ex rel Campbell v Tnshp of Delavan 210 Wis. 2d 239 (Ct. App. 1997)

— Return that includes materials extraneous to the hearing record subject to sanctions

Merkel v Village of Germantown 218 Wis. 2d 572, 579 (Ct. App. 1998)

- Return may not raise theory of law different from that presented to the Bd

St ex rel McMillian v Dickey 132 Wis. 2d 266, 279 (Ct. App. 1986)

- Failure to make return may entitle petitioner to relief via contempt, mandamus, or habeas corpus

e. Motion to quash or supersede writ

St ex rel Casper v Bd of Trustees 30 Wis. 2d 170 (1966)

- May be filed either before or after return to writ

- Purpose of motion to quash

Lakeshore Dev Corp v Plan Comm'n 12 Wis. 2d 560 (1961)

— Motion admits arguendo facts of petition

Lakeshore Dev Corp v Plan Comm'n 12 Wis. 2d 560 (1961)

— Motion challenges legal sufficiency of complaint

St ex rel Czapiewski v Milw CSC 54 Wis. 2d 535 (1972)

— Motion may raise issues of fact susceptible of proof by evidence outside record

— Example: Whether petitioner guilty of laches

3) Complaint and order

a. Complaint must demand and specify the remedy

b. Service of an authenticated copy of the complaint and an order signed by the Judge is made on Def within the time specified in the order

c. The order may specify a time period shorter than that allowed by § 802.06 for filing an answer or other responsive pleading

Koenig v Pierce Cty Dept of Human Servs 2016 WI App 23, ¶ 26 367 Wis. 2d 633

d. Certiorari action commenced when the plaintiff files the complaint and requests an order from the Ct under the statute, not the date the Judge signs the order

e. Sec. 801.02(1) and (5) indicate that a complaint must be filed within 30 days, whereas a writ must be served within 30 days

B. Timeliness

Collins v Policano 231 Wis. 2d 420, 438 (Ct. App. 1999)

1) Common-law certiorari must be filed within 6 months after action sought to be reviewed

2) Statutory certiorari time for appeal governed by applicable statute. *See* **Sec. 7.B.**, *infra*

§ 801.02(5)
Tobler v Door Cty
158 Wis. 2d 19 (1980)

C. Three ways to commence (statutory or common law)

1) Summons and complaint

§ 801.02(1)
Bergstrom v Polk Cty
2011 WI App 20
331 Wis. 2d 678

a. Service of summons and complaint pursuant to § 801.11

DNR v Walworth Cty
Bd of Adjustment
170 Wis. 2d 406, 416
(Ct. App. 1992)

b. Filing date is date of commencement (provided service is accomplished in the appropriate time period)

St ex rel Kurtzweil v
Sawyer Cty Bd of
Appeals
2023 WI App 43
409 Wis. 2d 77

c. If summons and complaint is used as the method and is served, then Def must answer within statutory time frame

2) Writ

§ 801.02(5)

a. Service of appropriate writ on Def named in writ, if copy is filed immediately

DNR v Walworth Cty
Bd of Adjustment
170 Wis. 2d 406, 416
(Ct. App. 1992)

b. Service date is date of commencement (service must be timely—see **Sec. 7.B.** below)

3) Complaint and order

§ 801.02(5)

a. Filing complaint demanding and specifying remedy, if service of authenticated copy of complaint and of order signed by Judge is made on Def within time specified in order

b. Def must be served within time specified in order

DNR v Walworth Cty
Bd of Adjustment
170 Wis. 2d 406, 416
(Ct. App. 1992)

c. Filing date is date of commencement (provided service is accomplished in specified time)

§ 801.02—Judicial
Council Note, 1981

d. Order may be used for shortening time to file response. This option is for emergency situation when case may become moot before response is filed

4) If the certiorari action arises from a denial of a residential development application for approval, then special procedures apply under § 781.10

Town of Delafield v Winkelman
2004 WI 17, ¶ 30
269 Wis. 2d 109

5. Traditional Standards for Certiorari

Hanlon v Town of Milton
2000 WI 61, ¶ 23
235 Wis. 2d 597

NOTE: These standards also apply to statutory certiorari unless applicable statute provides otherwise. See **Sec. 7.D.** below.

A. Did Bd keep within its jurisdiction?

St ex rel Ruthenberg v Annuity & Pension Bd
89 Wis. 2d 463, 472
(1979)

Did Bd act within the scope of its powers?

B. Did Bd act according to law?

Bratcher v Housing Auth of Milwaukee
2010 WI App 97, ¶ 11
327 Wis. 2d 183

1) According to "law" includes the common-law concepts of due process and fair play: a hearing must provide minimal due-process or fair-play standards

St ex rel Ruthenberg v Annuity & Pension Bd
89 Wis. 2d 463, 473
(1979)

2) Did Bd follow applicable statutes and due-process requirements?

Hanlon v Town of Milton
2000 WI 61
235 Wis. 2d 597

3) Did Bd violate the petitioner's constitutional right to equal protection?

St ex rel Wasilewski v Bd of Sch Dirs
14 Wis. 2d 243 (1961)

4) Did Bd follow its own rules of procedure?

C. Were Bd's actions arbitrary, oppressive, or unreasonable, representing its will and not its judgment?

St ex rel Ruthenberg v Annuity & Pension Bd
89 Wis. 2d 463, 473
(1979)

1) Did Bd act without a rational basis for the exercise of discretion?

St ex rel Campbell v Tnshp of Delavan
210 Wis. 2d 239
(Ct. App. 1997)

2) Determination will be set aside when Bd disregarded uncontroverted evidence

Williams v Housing Auth of Milwaukee
2010 WI App 14, ¶ 10
323 Wis. 2d 179

3) Was the Bd's decision founded on sufficient evidence?

D. Was evidence such that it might reasonably make the order in question?

St ex rel Ruthenberg v Annuity & Pension Bd
89 Wis. 2d 463, 473
(1979)

1) This question applies the substantial evidence standard

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 43
362 Wis. 2d 290

a. Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the agency

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 43
362 Wis. 2d 290

b. Substantial evidence means credible, relevant, and probative evidence on which reasonable persons could rely to reach a decision

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 44
362 Wis. 2d 290

c. Although substantial evidence is less than a preponderance of the evidence, it is more than a mere scintilla of evidence and more than conjecture and speculation

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 45
362 Wis. 2d 290

d. Ct conducting a certiorari review should take into account all the evidence in the record

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 45
362 Wis. 2d 290

e. Reviewing Ct should consider the context of the evidence when determining whether it supports a Bd's action

St ex rel Ruthenberg v Annuity & Pension Bd
89 Wis. 2d 463, 473
(1979)

2) There is a presumption that the Bd acts according to law and the official decision is correct

St ex rel Ruthenberg v Annuity & Pension Bd
89 Wis. 2d 463, 473
(1979)

3) Weight and credibility of the evidence cannot be assessed

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 44
362 Wis. 2d 290
Gehin v Wis Group Ins Bd
2005 WI 16
278 Wis. 2d 111
Williams v Housing Auth of Milwaukee
2010 WI App 14, ¶ 14
323 Wis. 2d 179

4) Uncorroborated written hearsay alone (when contradicted by in-person testimony) will not support Bd's decision

St v Outagamie Cty Bd of Adjustment
2001 WI 78
244 Wis. 2d 613

5) If any reasonable view of the evidence would sustain the findings of the Bd, the findings are conclusive

E. Decision of Bd must contain reasons for action taken

Lamar Cent Outdoor, Inc v Bd of Zoning Appeals
2005 WI 117
284 Wis. 2d 1

1) Not sufficient for Bd to give its reasons in words of statute

Oneida Seven Generations Corp v City of Green Bay
2015 WI 50, ¶ 48
362 Wis. 2d 290

2) Written decision not required as long as reasoning is clear from transcript of the proceeding

Block v Waupaca Cty Bd of Zoning Adjustment

2007 WI App 199, ¶ 7
305 Wis. 2d 325

3) If Bd's written decision is insufficient, Ct turns to transcript of Bd's proceedings to determine whether it has adequately expressed its reasoning

6. Common-Law Certiorari

St ex rel Damerow
v Behrens
11 Wis. 2d 426 (1960)

A. Common-law certiorari is discretionary

Gentilli v Bd of Police
& Fire Comm'rs
2004 WI 60, ¶¶ 19–43
272 Wis. 2d 1

1) When judicial review is either inadequate or unavailable, action of Bd or comm'n may be reviewed by certiorari

In limited circumstances, statutory appeal and certiorari may both proceed even though issues overlap

St ex rel Smits v
City of De Pere
104 Wis. 2d 26, 31 (1981)

2) When there are statutory provisions for judicial review, certiorari review limited to those legal questions that could not have been raised by way of statutory judicial review

Klinger v Oneida Cty
149 Wis. 2d 838, 844
(1989)

B. Standard of review. When Circuit Ct takes no further evidence, decision of Bd entitled to presumption of correctness and validity

Steenberg v
Town of Oakfield
167 Wis. 2d 566, 572
(1992)

1) If there is conflicting evidence on an issue the Ct will not substitute its view for that of the Bd

Sills v Walworth Cty
Land Mgmt Comm
2002 WI App 111
254 Wis. 2d 538

2) Prima facie showing of wrongdoing may justify expansion of record if evidence outside record demonstrates procedural unfairness

C. Requirements for remedy

Outagamie Cty v Smith
38 Wis. 2d 24 (1968)

1) Final determination by quasi-judicial tribunal subject to supervisory control by Ct

St ex rel Welch
v Chatterton
239 Wis. 523 (1942)
St ex rel Sullivan

v Drake
130 Wis. 152 (1906)

2) Petitioner was party to proceedings below or is directly and substantially harmed by determination

St ex rel Smits v
City of DePere
104 Wis. 2d 26 (1981)

3) Lack of adequate alternative remedy

D. Remedy will not lie, when

St ex rel Badtke
v Sch Bd
1 Wis. 2d 208 (1957)

1) Alleged error is in exercise of discretion, not in existence of jurisdiction to exercise it

St ex rel Hron Bros
v Port Washington
265 Wis. 507 (1953)

2) Error is minor and Ct interference would only complicate matters further

St ex rel Kaczkowski v
Fire & Police Comm'rs
33 Wis. 2d 488, 500
(1967)

3) Statutory provision for judicial review is adequate to review questions of law

St ex rel Damerow
v Behrens
11 Wis. 2d 426 (1960)

4) Petitioner is guilty of laches

Collins v Policano
231 Wis. 2d 420, 438
(Ct. App. 1999)

In absence of statute, petition must be brought within 6 months after decision complained of or accrual of petitioner's right to relief

7. Statutory Certiorari

St ex rel Casper
v Bd of Trustees
30 Wis. 2d 170 (1966)

A. Statutory certiorari may be matter of right

Bettendorf v
St Croix Co Adj Bd
188 Wis. 2d 311
(Ct. App. 1994)

B. Timeliness

Miswald v
Waukesha Cty Bd of Adj
202 Wis. 2d 401
(Ct. App. 1996)

1) Time limit to seek certiorari review begins to run only after final Bd decision

Bettendorf v
St Croix Co Adj Bd
188 Wis. 2d 311
(Ct. App. 1994)

2) Reconsideration does not extend time for filing unless reconsideration raises new issue

C. Provides express right of Ct review of certain determinations by certiorari

Browndale Int'l
v Bd of Adj
60 Wis. 2d 182, 198
(1973)

1) Statutory language may change scope and purpose of review as well as applicable procedures

Berschens v
Town of Prairie du Sac
76 Wis. 2d 115 (1977)

a. When statutory provision does not enlarge scope of review, review by statutory certiorari co-extensive with that under common-law writ

State ex rel Brookside
Poultry Farms, Inc v
Jefferson Cty Bd of Adj
131 Wis. 2d 101 (1986)

b. When Ct takes no new evidence upon review, standard of review is same as for common-law certiorari

§ 59.694(10)(a)
§ 62.23(7)(e)10.a.

c. Some statutes permit Ct to supplement record below

D. Statutes conferring specific jurisdiction

§ 40.08(12)

1) Wisconsin Employee Trust Funds Bd

§ 59.694(10)

2) Cty zoning

§ 60.03

3) Town organization and dissolution

§ 61.35

4) Village zoning

§ 62.23(7)(e)
§ 68.13(1)

5) City zoning

§ 68.13(1)

6) Municipal administrative review

§ 70.47(13), (16)(a)
§ 70.85

7) Property tax valuations

§ 82.16
Dawson v
Town of Jackson
2011 WI 77, ¶¶ 64–72
336 Wis. 2d 318

8) Highway orders—contest of highway orders is by certiorari, not declaratory judgment

§ 801.50(5)

9) Venue for probation, extended supervision, and parole revocation review, and denial by a program review committee under § 302.113(9g) of a petition for modification of a sentence

§ 814.08(2)

10) Costs on review of Municipal Ct judgment

8. Judgment and Appeal

Wilusz v Witek
258 Wis. 397 (1951)

A. Granting motion to quash writ usually has same effect as affirming proceedings below

St ex rel Park Plaza
v O'Malley
59 Wis. 2d 217 (1973)

B. In some statutory writ proceedings, issuance of writ mandatory and should not be quashed

Proper procedure is to affirm proceedings below

St ex rel McDiarmid
v Knight
172 Wis. 138 (1920)

C. Ct can only affirm or reverse, in whole or in part, determination below

1) No power to amend or cure defects in proceedings below

§ 59.694(10)
§ 62.23(7)
Browndale Int'l
v Bd of Adj
60 Wis. 2d 182 (1973)

2) Statutory exceptions to this rule

St ex rel Momon
v Milw CSC
61 Wis. 2d 313, 320
(1973)
St ex rel Lomax v Leik
154 Wis. 2d 735
(Ct. App. 1990)

3) If Ct reverses as to one of several bases for determination below, it may remand to lower tribunal for reconsideration of its action in light of Ct's decision

Merkel v
Village of Germantown

218 Wis. 2d 572, 578
(Ct. App. 1998)

4) Generally, reviewing Ct may affirm or reverse Bd action, but may not order the Bd to perform a certain act

St ex rel Smits v
City of DePere
104 Wis. 2d 26 (1981)

5) Ct may set parameters for Bd on remand

Westel–Milwaukee Co
v Walworth Cty
205 Wis. 2d 244
(Ct. App. 1996)

Remand with directions appropriate when record insufficient to address issues raised

Tetra Tech EC, Inc v
Dep't of Revenue
2018 WI 75, ¶ 11 n8
382 Wis. 2d 496
See also § 227.57(11)

D. Lower tribunal's legal interpretation not binding upon reviewing Ct

In *Tetra Tech EC, Inc v Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, a majority of the Wis Supreme Ct ended the long-held practice of Cts deferring to administrative agencies' interpretation of statutes and regulations under certain conditions. See Note discussing the case in **CV 30, Sec. 11.G.** Footnote 8 of the lead opinion states that "[t]his decision applies to judicial review of all administrative agency decisions"

St ex rel Pittsburgh
Coal Co v Patterson
138 Wis. 475 (1909)

E. Since only questions of law are presented, judgment need not recite formal findings and conclusions

Clark v Waupaca Cty
Bd of Adjustment
186 Wis. 2d 300
(Ct. App. 1994)
Busse v City of Madison
177 Wis. 2d 808, 813
(Ct. App. 1993)

F. If Ct's decision on one issue is dispositive of case, other issues raised need not be reviewed

G. Ct may order that copy of judgment be certified to clerk of Bd below, whose duty it then becomes to proceed according to its terms and directions

H. Board may reconsider its decision

Schoen v Bd of Fire &
Police Comm'rs
2015 WI App 95, ¶¶ 15–22, 366 Wis. 2d 279

1) A quasi-judicial body has the inherent authority to reconsider a decision based on an error of law

Schoen v Bd of Fire &
Police Comm'rs

2015 WI App 95, ¶ 19
366 Wis. 2d 279

2) The authority to reconsider a decision based on error is implicit in such grant of authority to a quasi-judicial body

Schoen v Bd of Fire & Police Comm'rs
2015 WI App 95, ¶ 19
366 Wis. 2d 279

3) Quasi-judicial body is defined as having a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of Cts

*Schoen v Bd of Fire & Police Comm"*rs
2015 WI App 95, ¶ 20
366 Wis. 2d 279

4) It is a fundamental and basic principle of administrative agency law that an administrative agency has the power to reconsider its own decisions since the power to decide carries with it the power to reconsider

I. Enforcement of writ of certiorari

Winkelman v Town of Delafield
2000 WI App 254
239 Wis. 2d 542

1) Separate enforcement action with service of summons and complaint or writ required to obtain personal jurisdiction. Motion brought as part of original certiorari proceeding is insufficient

State ex rel Iushewitz v Milw Cty Pers Rev Bd
176 Wis. 2d 706 (1993)

2) Use of mandamus

3) Zoning violations

Town of Delafield v Winkelman
2004 WI 17
269 Wis. 2d 109

a. Imposition of forfeiture, or

Forest Cty v Goode
219 Wis. 2d 654 (1998)

b. Equitable relief—injunction, abatement, or estoppel defense

Town of Delafield v Winkelman
2004 WI 17
269 Wis. 2d 109

- Although certiorari Ct may not weigh equity, Ct hearing enforcement action retains equitable power to deny enforcement

J. Appeal

St ex rel Cox v DHSS
105 Wis. 2d 378, 380
(Ct. App. 1981)

St ex rel Wis River Power Co v Bd of Rev
125 Wis. 2d 94
(Ct. App. 1985)

1) Standard of appellate review is same as that in Trial Ct

2) Ct of Appeals not bound by Trial Ct decision

CV 27: HABEAS CORPUS

1. Scope of Remedy

A. Definition

St ex rel L'Minggio v Gamble
2003 WI 82, ¶ 18
263 Wis. 2d 55

1) Extraordinary remedy issued in civil action as equitable relief when authority restraining a person constitutionally or jurisdictionally defective

Maier v Byrnes
121 Wis. 2d 258
(Ct. App. 1984)

Remedial statute, liberally construed

St ex rel Kanieski v Gagnon
54 Wis. 2d 108, 112
(1972)

2) Habeas corpus is collateral action normally used to raise questions concerning

St ex rel Kanieski v Gagnon
54 Wis. 2d 108, 112
(1972)
In re Graham
74 Wis. 450 (1889)

a. Subject-matter or personal jurisdiction of convicting Ct

St ex rel Kanieski v Gagnon
54 Wis. 2d 108, 112
(1972)
Babbitt v St
23 Wis. 2d 446, 452
(1964)

b. Validity of conviction against charge that law under which Def convicted is void

St ex rel Kanieski v Gagnon
54 Wis. 2d 108, 112
(1972)
Babbitt v St

23 Wis. 2d 446, 452
(1964)

c. Constitutional defects in conviction process

St v Ramey
121 Wis. 2d 177
(Ct. App. 1984)

d. Constitutional defects in probation revocation process; e.g., ineffective assistance of counsel at revocation hearing

St ex rel Reddin v Galster
215 Wis. 2d 179
(Ct. App. 1997)

- If not constitutional challenge, review must be by certiorari

St ex rel Wohlfahrt
v Bodette
95 Wis. 2d 130
(Ct. App. 1980)

e. Validity of criminal complaint and bindover

St ex rel Dowe v Cir Ct
184 Wis. 2d 724 (1994)

- Not available to attack bindover

Wolke v Fleming
24 Wis. 2d 606, 613
(1964)
In re Milburn
59 Wis. 24 (1883)

3) Remedy of habeas corpus does not perform function of appeal or writ of error

a. Ordinary judicial errors are not considered

St ex rel Kanieski
v Gagnon
54 Wis. 2d 108, 112
(1972)
St v Langston
53 Wis. 2d 228, 231
(1971)
Carrillo v US
332 F2d 202
(10th Cir. 1964)

b. Remedy not normally used to challenge sufficiency of evidence supporting guilty verdict, unless guilty verdict based on no evidence at all

St v Langston
53 Wis. 2d 228, 231
(1971)
Carrillo v US
332 F2d 202, 203
(10th Cir. 1964)

c. Remedy not normally available to challenge erroneous admission of evidence at trial

d. Remedy not available to challenge improper jury instructions at trial

St ex rel Zdanczewicz
v Snyder
131 Wis. 2d 147 (1986)

e. Questions regarding application of exclusionary rule not appropriate for review

See Wis Const art VII,
§ 8

4) Privilege of habeas corpus cannot be suspended

B. Purpose

In re Ziegler
245 Wis. 453, 454 (1944)

1) To require petitioner to be brought before Ct to determine whether unlawfully imprisoned or restrained of personal liberty

JV v Barron
112 Wis. 2d 256, 260
(1983)

2) To protect and vindicate person's right of personal liberty by freeing from illegal restraint

2. Persons Eligible to Seek Habeas Corpus

St ex rel Haas
v McReynolds
2002 WI 43, ¶ 12
252 Wis. 2d 133

Party seeking habeas corpus relief must be: restrained of liberty; restraint imposed is without jurisdiction or contrary to Constitution; and party must have no other adequate remedy

§ 782.01
§ 782.02

A. Petitioner must be "restrained" of liberty

St ex rel Hake v Burke
21 Wis. 2d 405 (1963)
St ex rel Clifton v Young
133 Wis. 2d 193
(Ct. App. 1986)

1) Person denied parole on basis of improper release date calculation

§ 976.03(10), (20)

2) Person arrested under warrant for extradition may seek habeas corpus to test validity of arrest

St ex rel Kohl v Kubiak
255 Wis. 186 (1949)

Person may not test validity of criminal charges issued by state demanding extradition

St ex rel Wohlfahrt
v Bodette
95 Wis. 2d 130
(Ct. App. 1980)

3) Pretrial release on personal recognizance sufficient "restraint" to give petitioner standing to seek remedy

§ 782.01(2)
St ex rel Jones

v Gerhardstein
141 Wis. 2d 710 (1987)
St ex rel Watts
v Combined Cmty
Servs Bd
122 Wis. 2d 65 (1985)

4) Any person confined in hospital or institution as mentally ill or committed for treatment or protective placement may prosecute remedy

§ 48.15, 938.15
JV v Barron
112 Wis. 2d 256 (1983)
Anderson v Anderson
36 Wis. 2d 455 (1967)

5) In Wis, habeas corpus lies to adjudicate legal custody of minor children and Juvs

St ex rel Kelley v Posner
91 Wis. 2d 301
(Ct. App. 1979)

6) Person who has posted deposit for traffic violation not restrained of personal liberty and not entitled to seek writ

B. Restraint must be without jurisdiction or contrary to Constitution

In re Graham
74 Wis. 450 (1889)

1) Habeas corpus traditionally reached only jurisdictional defects, including

St ex rel Dore v Stoltz
42 Wis. 2d 534, 538
(1969)
Wolke v Fleming
24 Wis. 2d 606, 614
(1964)
St ex rel Cornellier
v Black
144 Wis. 2d 745, 750
(Ct. App. 1988)

a. Validity of criminal complaint

St ex rel Dore v Stoltz
42 Wis. 2d 534, 538
(1969)
St ex rel McCaffrey
v Shanks
124 Wis. 2d 216
(Ct. App. 1985)

b. Validity of bindover after prelim

St ex rel Warrender v
Kenosha Cty Ct
67 Wis. 2d 333 (1975)

c. Personal jurisdiction of Ct, when

- Complaint is insufficient, and

- Petitioner has not waived objection to personal jurisdiction

St v Smith
131 Wis. 2d 220 (1986)
St ex rel Zdanczewicz v Snyder
131 Wis. 2d 147 (1986)

- Illegal arrest no longer deprives Ct of jurisdiction

Pepin v St ex rel Chambers
217 Wis. 568, 575–76 (1935)

d. Whether prosecution was barred by statute of limitation

Servonitz v St
133 Wis. 231 (1907)

e. Whether judgment based on unconstitutional statute

Michigan v Doran
99 S. Ct. 530 (1978)
St v Stone
111 Wis. 2d 470, 474 (1983)
St ex rel Reddin v Meekma
102 Wis. 2d 358, 362–63 (1981)

f. Validity of extradition documents

St ex rel Ehlers v Endicott
188 Wis. 2d 57
(Ct. App. 1994)

- Whether extradition documents facially adequate

- Whether petitioner is fugitive charged with crime in demanding state

Babbitt v St
23 Wis. 2d 446, 452 (1964)

2) Modern view is that habeas corpus will redress constitutional as well as jurisdictional defects, including

St ex rel Warrender v Kenosha Cty Ct
67 Wis. 2d 333, 339 (1975)

a. Ruling on motion to suppress evidence on constitutional grounds, when other legal remedies are inadequate

St ex rel Derber v Skaff
22 Wis. 2d 269 (1964)

b. Validity of waiver of jury trial

St ex rel Burnett v Burke
22 Wis. 2d 486 (1964)

c. Validity of waiver of Atty

St ex rel White v Gray
58 Wis. 2d 285 (1973)

d. Voluntariness of plea

St v Johnson
101 Wis. 2d 698, 703
(Ct. App. 1981)

e. Whether execution of sentence is proper

St v Johnson
101 Wis. 2d 698, 703
(Ct. App. 1981)

- Validity of computation of "good time" credit

St ex rel Clifton v Young
133 Wis. 2d 193
(Ct. App. 1986)

f. Validity of administrative rule relating to criminal prosecutions, e.g., probation revocation rules

St v Evans
2004 WI 84, ¶ 4
273 Wis. 2d 192
St ex rel Santana
v Endicott
2006 WI App 13, ¶ 4
288 Wis. 2d 707

g. Ineffective assistance of appellate counsel in lieu of § 974.06 motion (See **Sec. 3.D.**, *infra*, and **Ineffective Assistance of Counsel**, **Criminal Benchbook, CR 41**)

St ex rel Hager v Marten
226 Wis. 2d 687 (1999)

h. Issues of statutory construction in context of constitutional or jurisdictional defects

C. Another remedy not available

St ex rel Haas
v McReynolds
2002 WI 43, ¶¶ 14–15
252 Wis. 2d 133

1) If other remedy available

Smith v St
33 Wis. 2d 695, 702–03
(1967)

2) Constitutional issues cannot be raised on habeas corpus when time for appeal or writ of error has not yet expired

§ 974.06(8)
St v Escalona-Naranjo
185 Wis. 2d 168 (1994)

3) Remedy of habeas corpus not available unless petitioner has first used any adequate § 974.06 postconviction motion

a. § 974.06 procedures supplant habeas corpus remedy in more convenient forum, Ct of conviction

b. § 974.06 motions are specific statutory remedies to challenge validity of judgment of conviction and sentence, not validity of custody itself

§ 782.46

4) Remedy of habeas corpus not available to prisoners passing through Wis

St ex rel Reynolds
v Kenosha Cty Ct
11 Wis. 2d 560 (1960)

5) Remedy of habeas corpus not available when matter to be reviewed has been or is being heard in concurrent Ct on habeas corpus

St v Pozo
2002 WI App 279
258 Wis. 2d 796

6) Remedy of habeas corpus not available when petitioner asserts claim that could or should have been raised in prior proceeding or that was previously litigated in prior proceeding

3. Subject-Matter Jurisdiction

Wis Const art VII, § 8
§ 753.03
§ 781.01

A. Subject-matter jurisdiction is within general jurisdiction of Circuit Cts

JV v Barron
112 Wis. 2d 256 (1983)

1) Circuit Cts must exercise jurisdiction even though petitioner confined pursuant to order or judgment of Circuit Ct

2) Comity is insufficient justification to refuse remedy

B. Authority to grant habeas corpus remedy also conferred by

§ 48.15

1) Children's Code

§ 51.45(13)(m)

2) Mental Health Act

§ 938.15

3) Juvenile Justice Code

§ 976.03(10), (27)(a)

4) Uniform Criminal Extradition Act

§ 976.05

5) Interstate Agreement on Detainers

St v Theoharopoulos
72 Wis. 2d 327 (1976)

C. State Cts have no jurisdiction to grant habeas corpus remedy on application of person held under claim and color of authority of US by officer of federal government

St ex rel Santana
v Endicott
2006 WI App 13, ¶ 4
288 Wis. 2d 707

D. Ineffective assistance of appellate counsel claim must be brought in appellate Ct

4. Venue

A. Within Cty where petitioner detained

§ 782.03
§ 801.50(4)(b)

1) Application for remedy may be made to any Ct, Justice, Judge, or Circuit or Supplemental Ct Comm'r, except

St ex rel Le Febre
v Abrahamson
103 Wis. 2d 197, 201
(1981)

a. Individual Supreme Ct Justices have no authority to issue remedy, and

St ex rel Le Febre
v Abrahamson
103 Wis. 2d 197, 200–01
(1981)

b. Supreme Ct Justices normally forward application to Ct of Appeals of district where petitioner resides

§ 782.03

2) Exception exists where no Judge within Cty can or will grant remedy

Application may be made to Judge residing in adjoining Cty

§ 801.50(4)(a)

B. If prisoner's conviction or sentence challenged, action must be brought in Cty where prisoner was convicted or sentenced

§ 801.52
St ex rel West v Bartow
2002 WI App 42
250 Wis. 2d 740

C. In proper case, court can grant discretionary change of venue

§ 782.03
§ 782.05

5. Parties

St ex rel Reynolds
v Flynn
180 Wis. 556 (1923)

A. State, on relation of petitioner, is plaintiff

St ex rel Hellige
v Milw Liedertafel
166 Wis. 277 (1917)

B. Person charged with unlawfully restraining petitioner is at least one Def

1) Any other party interested in continuance of restraint is potential Def entitled to intervene and be heard

§ 781.04(2)
§ 782.26

2) In criminal cases, DA must be notified of hearing

St ex rel Durner v Huegin
110 Wis. 189 (1901)

3) Def may be represented by private Atty

6. Non-Writ Procedure

§ 781.01

A. Remedy of habeas corpus available as interim or final relief in action or proceeding governed by rules of civil procedure

1) Remedy of habeas corpus formerly available only by writ

§ 781.01

2) Use of non-writ procedure does not alter nature of remedy or scope of proceedings

B. Commencement of action

§ 801.02(1)

1) Plaintiff files and serves complaint demanding remedy of habeas corpus together with either

§ 801.02(1)

a. Summons, or

§ 801.02(5)
§ 802.06

b. Order signed by Judge requiring answer less than 45 days after service

- Order may also limit time for service

C. Temporary relief

§ 781.02

1) Plaintiff may request temporary relief by motion

§ 781.02

2) Procedure for motion requesting temporary relief governed by § 801.15(4), except

Ct may rule ex parte on motion, if plaintiff establishes an emergency exists

§ 781.04(1)

D. Ct may admit plaintiff to bail

§ 781.04(2)

E. DA of Cty where action brought must be notified of time and place of hearing, if plaintiff detained upon criminal accusation

7. Writ Procedure

§ 782.04

A. Petition must be verified

§ 782.03

1) Signature of prisoner, or

§ 782.03

2) Signature of person acting on prisoner's behalf

§ 782.04

B. Contents of petition

§ 782.04(1)

1) Averment that person on whose behalf writ applied for is restrained of personal liberty

§ 782.04(1)

2) Identification of person, by whom imprisoned, and place

§ 782.04(2)

3) Averment that person not imprisoned by virtue of judgment, order, or executions specified in § 782.02

§ 782.04(3)

4) Cause or pretense of imprisonment to best of petitioner's knowledge and belief

§ 782.04(4)

5) Copy of order or process authorizing restraint, or averment that such was duly demanded and refused by custodian or could not be demanded by reason of removal or concealment of prisoner

§ 782.04(5)

6) Statement why imprisonment is illegal

§ 782.03

7) If petitioner sentenced to state prison

a. Copy of any § 974.06 motion made and indication of disposition, or

b. Statement that no § 974.06 motion made

§ 782.06

C. Writ

1) Ct or Judge to whom petition properly presented must issue writ, unless it appears from petition and attached documents that prisoner not entitled to relief

§ 782.09
JV v Barron
112 Wis. 2d 256 (1983)

Willful refusal of sufficient application makes Judge liable to prisoner for $1,000

In re Cash
215 Wis. 148 (1934)
St ex rel Reynolds
v Kenosha Cty Ct
11 Wis. 2d 560 (1960)

2) Writ need not issue if application clearly shows prisoner not entitled to relief

State ex rel Coleman
v McCaughtry
2006 WI 49
290 Wis. 2d 352

Delay in seeking relief not a bar unless petitioner guilty of laches

§ 782.07

3) Writ commands production of prisoner immediately after receipt of writ or at specified time, together with return showing time and cause of imprisonment

Must be signed and dated by Judge or issued by Ct

§ 782.33

D. Warrant in lieu of writ

1) If there is cause to believe that prisoner may be removed from State or suffer irreparable injury before habeas corpus relief can be obtained, warrant may be issued in lieu of writ

§ 782.34

a. If proof also sufficient to justify arrest of prisoner's custodian, warrant may contain order for arrest of such custodian

§ 782.36

- Criminal proceedings may be instituted against custodian

§ 782.35

2) Officer or person to whom warrant directed must forthwith bring prisoner (and if so ordered, prisoner's custodian) before Ct

Further proceedings are same as those for habeas corpus

§ 782.10

E. Service of writ

1) Writ can only be served by elector of Wis

2) Service can be effectuated by

§ 782.10(1)

a. Delivering copy of writ to person to whom directed

§ 782.10(2)

b. If such person cannot be found, leaving writ at jail or place of prisoner's confinement with prisoner's custodian, or

§ 782.10(3)

c. If admittance to place of confinement denied, posting copy of writ in conspicuous place on exterior of that place

§ 782.12

3) Unless service is by posting, party serving writ on officer must tender statutory fees for delivering prisoner to Ct and give bond if required by officer

§ 782.10(4)

4) Person serving writ must promptly return proof of service

§ 801.02(5)
St ex rel Jones v Gerhardstein 141 Wis. 2d 710, 718 (1987)

5) Service of writ confers jurisdiction (no summons required) if copy filed forthwith

St ex rel Hellige v Milw Liedertafel 166 Wis. 277 (1917)

F. Motion to quash

1) Respondent may challenge sufficiency of petition by motion to quash writ

2) If petition insufficient, Ct enters judgment quashing writ

3) If motion to quash denied, respondent must make return

G. Return

§ 782.08

1) Failure of writ to identify person with custody of prisoner does not excuse that person's disobedience of writ

§ 782.13
§ 782.15
§ 782.29

2) Any custodian on whom writ served must make return and produce prisoner at time directed, unless prisoner too sick or infirm to be brought before Ct, which fact shall be indicated in verified return

§ 782.16
§ 782.17
§ 782.18

3) Failure to make return is punishable by contempt

4) Return must

§ 782.14(1)

a. State whether respondent has custody of prisoner

§ 782.14(2)

b. State authority for and true cause of imprisonment, if respondent has custody

§ 782.14(3)

c. Include copy of any written authority by which prisoner detained

- Original must be produced at hearing

§ 782.14(4)

d. State to whom custody was transferred and at what time, in addition to cause and authority for transfer, if respondent has transferred custody of person to another

§ 782.14(4)

e. Include signature and oath of respondent

§ 782.26

5) No order for discharge may be made unless interested parties, including DA, given notice. The statute is silent as to the party responsible for giving notice

§ 782.19

H. Traverse of return

1) Prisoner may move to strike return or may answer by denying any material fact pleaded in it

May allege any additional facts entitling prisoner to discharge in verified pleading known as answer or traversal

In re Milburn
59 Wis. 24 (1883)

2) Allegations in return not so denied are admitted

St ex rel Hellige
v Milw Liedertafel
166 Wis. 277 (1917)

3) Alternatively, prisoner may admit facts stated in return but challenge their sufficiency by motion for discharge

I. Hearing

§ 782.19

1) If pleadings raise issue of fact, Ct or Judge tries issues in summary way

2) Custody of petitioner during hearing

§ 782.25

a. Pending determination of writ, safekeeping of petitioner under direction and authority of Ct

§ 782.25

b. Ct may commit petitioner to custody of sheriff

§ 782.25

c. Ct may place petitioner in such care or custody as circumstances require, including

St ex rel Reynolds v Kenosha Cty Ct 11 Wis. 2d 560, 571 (1960)

- Release of petitioner on bail

Smith v Bennett 81 S. Ct. 895 (1961)
Griffin v Illinois 76 S. Ct. 585 (1956)

3) Petitioner has right to Atty

a. If petitioner indigent, an Atty must be provided on request

§ 782.29

b. If sickness or infirmity prevents appearance, prisoner may appear by Atty

§ 782.26

4) If it appears from return that any person in Cty other than respondent has interest in continuing prisoner's restraint, interested person or Atty must be given sufficient notice of time and place at which writ is returnable

§ 782.27

If prisoner detained on any criminal accusation, notice to be given to DA

Booker v Israel 610 F. Supp. 1310, 1314 (E.D. Wis. 1985)

5) Burden of proof is on petitioner

St ex rel McMillian v Dickey 132 Wis. 2d 266 (Ct. App. 1986)

Burden is preponderance of the evidence

6) Ct makes findings of fact and conclusions of law on record

7) Ct makes final order

J. Judgment

§ 782.20
§ 782.23
§ 782.24

1) Judgment may order prisoner discharged, admitted to bail, or remanded to custody

St ex rel LaFollette v Brown Cty Cir Ct 37 Wis. 2d 329 (1967)

2) Discharge reaches no further back than point of error

If prisoner in custody when error occurred, discharge may be limited to current custody and remand to committing Ct

St ex rel Memmel v Mundy 75 Wis. 2d 276, 288 (1977)
St ex rel McMillian v Dickey 132 Wis. 2d 266, 286 (Ct. App. 1986)

3) Habeas corpus is an equitable remedy

a. Relief not limited to release of person confined

b. Ct may tailor remedy for particular facts

St ex rel Korne v Wolke 79 Wis. 2d 22, 27 (1977)

4) Prevailing party not entitled to costs

K. Effect of discharge

§ 782.32

1) Prisoner discharged on writ of habeas corpus may not be restrained again for same cause

§ 782.38
§ 782.39

a. Any person who does so is liable to prisoner for $1,250 damages and subject to fine of up to $1,000 and imprisonment for not more than 6 months, or both

b. Following are not deemed same cause

§ 782.32(1), (2)
Tell v Wolke 21 Wis. 2d 613 (1963)

- Re-arrest or resentencing for same criminal offense

§ 782.32(3), (4)

- Re-imprisonment by legal process or new execution in same civil cause or action

§ 782.30

2) Obedience to final order for discharge may be enforced by contempt in same manner as failure to make return to writ

a. Contemnor also liable to prisoner for $1,250, plus special damages

§ 782.31

b. No officer is liable for obeying any final order of discharge

L. Standard of review

St ex rel McMillian v Dickey
132 Wis. 2d 266, 286
(Ct. App. 1986)

1) Habeas presents mixed question of law and fact

a. Trial Ct's factual findings will be upheld unless clearly erroneous

b. Legal conclusion subject to de novo review

CV 28: MANDAMUS/PUBLIC RECORDS

Committee Practice Note: For additional guidance, the Civil Benchbook Committee recommends referring to the Wisconsin DOJ's *Wisconsin Public Records Law Compliance Guide* (May 2024), https://www.doj.state.wi.us/office-open-government/open-government-law-and-compliance-guides.
For a general discussion governing access to court records, see *John Doe 1 v. Madison Metro. Sch. Dist.*, 2021 WI App 60, ¶¶ 19–32, 399 Wis. 2d 102, *aff'd*, 2022 WI 65, 403 Wis. 2d 369.

1. Definitions

§ 19.32

A. "Authority" means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department, or public body; a governmental or quasi-governmental corporation; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation that receives more than 50% of its funds from a county or municipality and that provides public health or safety services; a university police department; or any formally constituted subunit of these authorities

St ex rel Flynn v Kemper Ctr, Inc
2019 WI App 6, ¶¶ 14–15
385 Wis. 2d 811

B. "Quasi-governmental corporation" determined on totality of circumstances and factors of funding, function, appearance, control, and governmental access to records

Mt Horeb Cmty Alert v Vill Bd of Mt Horeb
2003 WI 100
263 Wis. 2d 544
52 Am Jur 2d *Mandamus*
§§ 1, 18 (2021)

C. "Mandamus" is an extraordinary remedy granted on equitable grounds in civil action; directed to some public officer, Bd, corporation, or person; requiring performance of legal duty

2. Subject-Matter Jurisdiction

Wis Const art VII, § 8
753.03

A. Within general jurisdiction of Circuit Ct, but

Eau Claire Leader-
Telegram v Barrett
146 Wis. 2d 647
(Ct. App. 1988)

No Circuit Ct has superintending authority over another and cannot issue a writ of mandamus against it

B. Special jurisdictional statutes

§ 16.415(2)

1) Certification of State payrolls

§ 19.37(1)

2) Public records law

§ 19.97(2)

3) Open meetings law

§ 783.03

4) Issues of fact in mandamus proceedings instituted in Supreme Ct

a. Tried in Circuit Ct of Cty where cause of action arose, or

b. Tried in Circuit Ct for such other Cty as Supreme Ct orders, for cause shown

3. Court Discretion

St ex rel
Cont'l Ins Co
v Doyle
40 Wis. 220 (1876)

A. No discretion to refuse remedy when invoked on behalf of State in matter *publici juris*

Miller v Smith
100 Wis. 2d 609 (1981)
St ex rel Horton
v Brechler
185 Wis. 599 (1925)
Keane v St Francis Hosp
186 Wis. 2d 637
(Ct. App. 1994)

B. Discretion to refuse remedy on equitable grounds when remedy invoked to enforce private rights even when legal prerequisites are met

Lake Bluff Housing
Partners v S Milwaukee
197 Wis. 2d 157 (1995)

1) Erroneous exercise of discretion if premised on erroneous view of the law

2) Ct may not use equitable considerations to determine if clear legal right exists

C. Appellate Ct will affirm unless Circuit Ct erroneously exercised its discretion

4. Requirements for Remedy

St ex rel Zignego v
Wis Elections Comm'n
2021 WI 32, ¶ 38
396 Wis. 2d 391

A. Four prerequisites for issuance of writ

1) Clear legal right to relief

2) Positive and plain duty on part of official or body to whom writ directed

3) Substantial damages caused by nonperformance of duty

4) No other adequate remedy at law

B. Clear legal right

Eisenberg v DILHR
59 Wis. 2d 98 (1973)

1) Must be specific legal right free from substantial doubt

Lake Bluff Housing
Partners v S Milwaukee
197 Wis. 2d 157 (1995)

2) Ct may not use equitable considerations to determine if clear legal right exists

Neu v Voege
96 Wis. 489 (1897)

3) Petitioner must not be guilty of laches or otherwise ineligible for equitable relief

C. Positive and plain duty

Eisenberg v DILHR
59 Wis. 2d 98 (1973)
Collins v Policano
231 Wis. 2d 420
(Ct. App. 1999)

1) Mandamus will lie only to compel performance of specific duties imposed by law

St ex rel Bd of Educ
v Hunter
111 Wis. 582 (1901)

2) Duty must be presently due when application made, except

St ex rel Racine Cty
v Schmidt
7 Wis. 2d 528 (1959)

Remedy can be granted before duty is due, if time required to perform is such that remedy ordered on due date would be ineffectual

St ex rel City of Baraboo v Page
201 Wis. 262 (1930)

3) Does not lie to perform mere contractual obligation

Lake Bluff Housing Partners v S Milwaukee
197 Wis. 2d 157 (1995)

4) Duty must be clear and free of substantial doubt

Morrissette v DeZonia
63 Wis. 2d 429 (1974)

Ambiguous statute after Ct has construed its meaning may create clear duty

Law Enf Stds Bd v Vill of Lyndon Station
101 Wis. 2d 472 (1981)

5) If duty requires exercise of discretion, Ct may not compel action through mandamus

Vretenar v Hebron
144 Wis. 2d 655 (1988)
Galuska v Kornwolf
142 Wis. 2d 733
(Ct. App. 1987)

Mandamus will not direct sheriff or constable to enforce criminal statutes as investigative process is inherently discretionary

St ex rel Redenius v Waggenson
140 Wis. 265 (1909)

6) All conditions precedent to duty's performance must be met

St ex rel Hernandez v McConahey
42 Wis. 2d 468 (1969)

7) Duty must be one that respondent capable of performing

8) Examples

Pick v Menzl v City of Milw
32 Wis. 2d 266 (1966)
Wesbar Stamping Corp
238 Wis. 93 (1941)

a. Mandamus may compel officers of private business corporations to perform their duties

bin-Rilla v Israel
113 Wis. 2d 514 (1983)

b. Mandamus may lie to redress unconstitutional conditions of penal confinement

St ex rel Ondrasek v Calumet Cir Ct
133 Wis. 2d 177
(Ct. App. 1986)

c. Mandamus may lie to compel substitution of Judge

St ex rel Iushewitz
v Milw Cty Pers Rev Bd
176 Wis. 2d 706 (1993)

d. Mandamus may be used to enforce a Circuit Ct mandate to an agency pursuant to certiorari review

Mt Horeb Cmty Alert v
Vill Bd of Mt Horeb
2003 WI 100
263 Wis. 2d 544
St ex rel Meessmann v
Town of Presque Isle
2023 WI App 36
408 Wis. 2d 690
pet for rev denied

e. Mandamus may be used to compel certain types of municipalities to act on initiative petition pursuant to direct legislation statute

St ex rel Milw Cty Pers
Rev Bd v Clarke
2006 WI App 186,
¶¶ 47–49
296 Wis. 2d 210

f. Mandamus may be used to require compliance with order issued by entity with apparent authority to make such orders

D. Substantial damages

St ex rel Mueller
v Powers
64 Wis. 2d 643 (1974)

Petitioner must be substantially damaged by respondent's nonperformance of duty

E. Lack of alternative remedy

St ex rel Wolf v LaCrosse
Lutheran Hosp Ass'n
181 Wis. 33 (1923)

1) Mandamus not available if wrong can be remedied by ordinary civil action for damages, replevin, specific performance, declaratory relief, etc.

St ex rel Madison Airport
Co v Wrabetz
231 Wis. 147 (1939)

2) Mandamus not available if adequate administrative remedies have been established by statute

St ex rel Williams
v Shaughnessy
202 Wis. 537 (1930)

3) Mandamus not available when act complained of can be reviewed by appeal, writ of error, or certiorari

Keane v St Frances Hosp
186 Wis. 2d 637
(Ct. App. 1994)
St ex rel Morke v
Record Custodian

154 Wis. 2d 727
(Ct. App. 1990)

4) Mandamus available only if above remedies are not adequate and complete under circumstances of case

5) But note

bin-Rilla v Israel
113 Wis. 2d 514 (1983)
St ex rel Staples v DHSS
130 Wis. 2d 285
(Ct. App. 1986)

a. Ct may treat habeas corpus petition or certiorari petition as one for mandamus

St ex rel Racine Cty
v Schmidt
7 Wis. 2d 528 (1959)

b. Ct may grant declaratory relief in mandamus action

5. Parties

A. Relator must be real party in interest

St ex rel Burnham
v Cornwall
97 Wis. 565 (1897)

If public right is involved, mere citizenship may confer standing

St ex rel Hasbrouck
v Milwaukee
25 Wis. 122 (1869)

B. When duty to be performed is purely official, respondents may be designated by title without specification of names

Remedy will be directed to incumbents of such offices

List v Festge
9 Wis. 2d 297 (1960)

C. Only particular officer or body on whom duty rests is necessary party respondent, but others whose rights may be involved are proper parties

St ex rel Bowe
v Bd of Educ
63 Wis. 234 (1885)

D. When duty rests primarily on Bd, it is not necessary to implead its agents and servants who may actually perform duty in its behalf

6. Non-Writ Procedure

§ 781.01

A. Remedy of mandamus is available as interim or final relief in action or proceeding governed by rules of civil procedure

1) Remedy of mandamus formerly available only by writ

§ 781.01

2) Use of non-writ procedure does not alter nature of remedy or scope of proceedings

B. Commencement of action

§ 801.02(1)

1) Plaintiff files and serves complaint demanding remedy of mandamus together with either

§ 801.02(1)

a. Summons, or

§ 801.02(5)
§ 802.06

b. Order signed by Judge requiring answer or other responsive pleading less than 45 days after service (order may also limit time for service)

§ 801.02(5)
—Judicial Council Note, 1981

- Order serves same purposes as alternative writ and order to show cause under writ procedure

§ 801.02(5)
—Judicial Council Note, 1981

- This option is for the emergency situation when case may be moot before a response would be filed

C. Temporary relief

§ 781.02

1) Plaintiff may request temporary relief by motion

§ 781.02

2) Procedure for motion requesting temporary relief governed by § 801.15(4), except

Ct may rule ex parte on motion, if plaintiff establishes an emergency exists

§ 783.03

D. Issues of fact, including damages, may be tried by jury

Corrao v Mortier
7 Wis. 2d 494, 497 (1959)

1) Remedy of mandamus does not include right to damages

Corrao v Mortier
7 Wis. 2d 494, 496–97 (1959)

2) Remedy of mandamus may be sought in same action as one for damages

7. Writ Procedure

A. Definitions

1) Peremptory writ

Compels performance of respondent's legal duty

2) Alternative writ

a. Requires either performance or showing of cause why performance should not be compelled

Schend v St George's German Aid Soc'y 49 Wis. 237, 240–41 (1880)

b. Ct may treat petition for order to show cause why peremptory writ should not issue as petition for alternative writ

Schend v St George's German Aid Soc'y 49 Wis. 237, 241 (1880)

c. Ct must issue alternative writ when issues of material fact exist

B. Pleadings

§ 783.01, § 801.01(2)
Moore v Stahowiak 212 Wis. 2d 744 (Ct. App. 1997)

1) Mandamus is a civil action; rules of practice for civil actions apply

a. Petition for writ of mandamus is analogous to complaint

b. Return is analogous to an answer

St ex rel Cabott, Inc v Wojcik 47 Wis. 2d 759 (1970)

2) Sufficiency of pleadings is tested under rules governing civil actions

Watkins v Milwaukee CSC 88 Wis. 2d 411 (1979)

3) Six month time limit for certiorari does not govern mandamus

Elkhorn Area Sch Dist v East Troy Sch Dist 127 Wis. 2d 25 (Ct. App. 1985)

4) Doctrine of laches governs mandamus actions

Mandamus is not embraced within statute of limitation

C. Issuance of alternative writ

1) Ct issues alternative writ when

St ex rel Hoffman v Shea
70 Wis. 104 (1887)

a. Petition establishes prima facie case

Schend v St George's
German Aid Soc'y
49 Wis. 237, 241 (1880)

b. Issues of material fact exist

§ 753.04
St ex rel Taylor v
Bd of Supervisors
64 Wis. 218 (1885)

2) Form of writ

a. In name of State bearing date of issue

b. Attested in name of Judge

c. Returnable on date certain within 60 days, unless otherwise directed

d. Signed by Clerk of Ct

e. Sealed with Ct seal

f. Directed to person authorized to serve writs

St ex rel Jones v Oates
86 Wis. 634 (1893)

3) Formal defects may be disregarded as immaterial when they do not affect substantial rights

St ex rel Drury
v Supervisors of
Town of Lincoln
67 Wis. 274 (1886)

4) Not necessary that original writ be served upon respondent

a. Copy will suffice

St ex rel Havemeyer
v Bd of Supervisors

22 Wis. 379 (*396) (1867)

b. If writ is directed to Bd, original should be served on chairperson and copies on other members

D. Motion to quash

§ 783.01

1) Respondent may move to quash writ before time for making return has expired

Motion to quash is deemed motion to dismiss under § 802.06(2)

St ex rel Dame v LeFevre
251 Wis. 146 (1947)

2) Motion admits truth of allegations of petition, but challenges their sufficiency

St ex rel Bd of Educ
v Hunter
111 Wis. 582 (1901)

3) If motion is denied, leave may be given respondent to make return

St ex rel Faber v Hinkel
131 Wis. 103 (1907)

4) If motion to quash is granted, but not on merits, action is dismissed without prejudice to again commence for same relief

E. Return

St ex rel Holmes v Baird
11 Wis. 271 (*260) (1860)

1) Unless motion to quash has been granted, respondent must make return within time specified in writ

St ex rel Schroedel
v Pagels
257 Wis. 376 (1950)

2) Return constitutes answer to petition and is governed by same rules as pleadings in other civil actions

3) Petitioner may move to strike return which admits matters pleaded in return but challenges their sufficiency

§ 783.02
St ex rel Town of Spring
Lake v Pierce Cty
71 Wis. 321 (1888)

Unless motion to strike is made, defenses alleged in return are deemed controverted

F. Penalty

§ 783.07
§ 939.50(3)(h)

1) Whenever public officer or body to perform duty enjoined by peremptory writ without just excuse, Ct may impose penalty for Class H felony: up to 6 years' imprisonment or fine of up to $10,000, or both

§ 19.37(1)

8. Public Records Procedure—Mandamus

A. Mandamus appropriate remedy if authority withholds or delays access to public record after written request for disclosure

B. Definitions

§ 19.32(3)
St ex rel Greer
v Stahowiak
2005 WI App 219, ¶ 8
287 Wis. 2d 795

1) "Requester" does not include committed or incarcerated person, unless requested record contains specific references to that person or his/her minor children

§ 801.02(7)
Moore v Stahowiak
212 Wis. 2d 744
(Ct. App. 1997)

a. If requester is incarcerated person, must exhaust administrative remedies before commencing mandamus action

St ex rel Greer
v Stahowiak
2005 WI App 219
287 Wis. 2d 795

b. Incarcerated person requests analyzed under § 19.35(1)(am); see **Sec. 8.H.**, *infra*

§ 19.32(2)

2) "Record" is any material on which information is recorded or preserved, which has been created or is being kept by an authority

Blum v Bd of Educ
209 Wis. 2d 377
(Ct. App. 1997)

a. Records are "kept" by an authority when in possession of an officer or employee who falls under supervision of the "authority"

§ 19.36(3)
Bldg &
Constr Trades Council
v Waunakee Sch Dist
221 Wis. 2d 575
(Ct. App. 1998)

b. Includes any record produced or collected under contract entered into by the authority

§ 19.32(2)

c. "Record" does not include drafts and notes prepared for originator's personal use

Stone v Bd of Regents
2007 WI App 223
305 Wis. 2d 679

d. "Record" does not include identical copies of otherwise available records

§ 19.32(1)

3) "Authority" includes a state or local office, elected official, agency, Bd, or governmental or quasi-governmental corporation that has custody of a record

§ 19.36(3)
WIREdata, Inc v Sussex
2008 WI 69
310 Wis. 2d 397

a. Public body's status as an "authority" may not be avoided by delegating records creation and custody to a contractor

St v Beaver Dam Area Dev Corp
2008 WI 90
312 Wis. 2d 84

b. Entity is a quasi-governmental corporation if it resembles a government corporation in function, effect, or status

Wis Prof'l Police Ass'n v Wis Counties Ass'n
2014 WI App 106, ¶ 12
357 Wis. 2d 687

c. An unincorporated not-for-profit association is not an "authority" under § 19.32(1)

C. General provisions

Nichols v Bennett
199 Wis. 2d 268 (1996)

1) Nature of document, not its location, determines status under §§ 19.31–.37

Journal Times v City of Racine Bd
2015 WI 56, ¶¶ 55, 73
362 Wis. 2d 577

2) Statute does not require custodian to compile statistics or create record

§ 19.36(6)
Osborn v Bd of Regents
2002 WI 83
254 Wis. 2d 266

But may require custodian to redact information not subject to disclosure before releasing record

Grebner v Schiebel
2001 WI App 17
240 Wis. 2d 551

3) Custodian, not requester, determines how records are copied

Lueders v Krug
2019 WI App 36, ¶ 16
388 Wis. 2d 147

If "electronic copies" specifically requested, that request must be honored

St ex rel Gehl v Connors
2007 WI App 238
306 Wis. 2d 247

4) Records retention policy may not be attacked under Public Records Law

§ 19.37(1n)
St ex rel Auchinleck v Tn of LaGrange
200 Wis. 2d 585 (1996)

5) Notice of claim under § 893.80 not required

D. Authority may impose fees on requester

§ 19.35(3)(a), (b)

1) Cost may not exceed actual necessary and direct cost of reproduction

Media Placement Servs, Inc v Wis DOT
2018 WI App 34
382 Wis. 2d 191

Fee may be charged for online access to records

§ 19.35(3)(c)

2) May impose fee for locating record, not to exceed actual, necessary and direct cost, if cost is $50 or more

George v Record Custodian
169 Wis. 2d 573
(Ct. App. 1992)

3) No exemption as of right for indigents from payment of fees

§ 19.35(3)(e)

But authority may reduce or waive fee if "in the public interest"

§ 19.35(3)(f)
St ex rel Hill v Zimmerman
196 Wis. 2d 419
(Ct. App. 1995)

4) Can require prepayment of fee or estimated cost if total exceeds $5

§ 19.35(3)(f)

If requester is prisoner who failed to pay previous fee, may require prepayment of amount of both previous and current request

Milwaukee Journal Sentinel v City of Milwaukee
2012 WI 65, ¶ 22
341 Wis. 2d 607

5) Cannot charge for actual, necessary, and direct costs for reviewing and deleting nondisclosable information from responsive record

§ 19.35(3)(h)

6) Law enforcement agencies may sometimes impose fees for actual, necessary, and direct costs of redacting or pixelating audio/video content when required to by law

E. Preliminary judicial review before release of employee records

§ 19.356(2)

1) Custodian must give notice to employee record subject of impending request of the following employee-related records

a. Disciplinary investigation or record of violation of employment-related statute, rule, or policy

b. Record obtained through subpoena or search warrant

c. Record prepared by employer other than authority releasing record

§ 19.356(3), (4)

2) Subject of record may object within 5 days after notice and commence Ct action to restrain release of record within 10 days after notice

§ 19.356(4)

Requester of record may intervene as matter of right

§ 19.356(6), (7)

3) Ct may restrain authority from providing access to requested record

a. Ct to apply "substantive common law principles" construing right to inspect records in making decision

b. Generally requires "balancing test" (see *infra* **Sec. G.**)

c. Decision to be issued within 10 days after filing of action, unless extended for good cause; even if good-cause extension granted, Ct must issue decision within no more than 30 days after action filed

§ 19.32(1bg)
§ 19.356(9)

4) This procedure applies only to employees other than individuals holding local or state public office

Local and state public office holders entitled to notice of release and opportunity to augment record, but no provision for § 19.356 judicial review before release

Nichols v Bennett
199 Wis. 2d 268 (1996)
Hathaway v
Green Bay Sch Dist
116 Wis. 2d 388 (1984)

F. Presumption is disclosure of records unless there is:

1) Clear statutory exception. *See infra* **G.3**)

2) Common-law limitation. *See infra* **G.4**)

3) Overriding public interest in keeping record confidential. *See infra* **G.2**)

Wis News Press v Sheboygan Falls Sch Dist
199 Wis. 2d 768 (1996)
Journal/Sentinel v Aagerup
145 Wis. 2d 818
(Ct. App. 1988)

G. Ct's two-part analysis in reviewing custodian's decision to deny access to records under § 19.35(1)(a)

1) Did custodian give specific reasons for denial

Tratz v Zunker
201 Wis. 2d 774
(Ct. App. 1996)

a. Ct will not consider reasons not asserted by custodian

Journal/Sentinel v Aagerup
145 Wis. 2d 818
(Ct. App. 1988)

b. If public policy is basis for denial, custodian must state specific public policy reason for withholding record

- Unless statute leaves no room for explanation or discretion when applied to open records law

Chvala v Bubolz
204 Wis. 2d 82
(Ct. App. 1996)

c. If relying on statutory exception, mere citation to exemption statute is not sufficient

St ex rel Savinski v Kimble
221 Wis. 2d 833
(Ct. App. 1998)

- Unless information requested is covered by an exempting statute that does not itself require a balancing of public interests

St ex rel Gehl v Connors
2007 WI App 238, ¶ 19
306 Wis. 2d 247

d. Failure to state purpose of request is not proper reason for denial

Beckon v Emery
36 Wis. 2d 510 (1967)

e. Ct must issue mandamus if custodian gives no reasons or insufficient reasons

St ex rel Blum v Bd of Educ
209 Wis. 2d 377
(Ct. App. 1997)

- Unless record's confidentiality is expressly guaranteed by statute

Linzmeyer v Forcey
2002 WI 84
254 Wis. 2d 306

2) If specificity exists and public interest is claimed, Ct performs balancing test: Are custodian's reasons for withholding sufficient to outweigh strong public policy favoring disclosure?

§ 19.31
Newspapers, Inc v Breier
89 Wis. 2d 417 (1979)

a. Presumption is for disclosure

St ex rel Youmans
v Owens
28 Wis. 2d 672 (1966)

b. Answering this question usually requires preliminary in camera inspection of record by Ct

Law Offices of William
Pangman v Zellmer
163 Wis. 2d 1070
(Ct. App. 1991)

c. Whether harm to public interest outweighs public's interest in inspection is question of law

§ 19.35(1)
§ 19.85

- Exemptions to public records/open meetings law are indicative of public policy

§ 19.35(1)(i)
Levin v Bd of Regents
2003 WI App 181
¶¶ 14–18
266 Wis. 2d 481

d. Identity and purpose of requester of records is not part of balancing test

Madison Teachers, Inc
v Scott
2018 WI 11, ¶ 19
379 Wis. 2d 439
Milwaukee Journal
Sentinel v Dept of Admin
2009 WI 79
319 Wis. 2d 439

e. Balancing test must be applied with respect to each individual record

MacIver Inst for Pub
Policy v Erpenbach
2014 WI App 49, ¶ 18
354 Wis. 2d 61

f. E-mails to legislator, which relate to affairs of government, are public records

George v Knick
188 Wis. 2d 594
(Ct. App. 1994)

3) If statutory exception to disclosure claimed, balancing test inapplicable

a. Statutory exceptions to requests under § 19.35(1)(a) include

§ 19.36(1)–(13)

- Records exempted from disclosure under § 19.36(1)–(13)

§ 146.82(1)
§ 51.30

- Health-care records and mental health treatment records

La Crosse Tribune v Circuit Ct (In re St v Stanley) 2012 WI App 42, ¶ 35 340 Wis. 2d 663

- Conditional release plan for person found not guilty by reason of mental disease or defect and committed under § 971.17

§ 757.93

- Judicial commission proceedings

§ 118.125

- Pupil records

§ 968.26

- John Doe proceedings

§ 54.75
Wis Voter Alliance v Reynolds 2023 WI App 66, ¶ 34 410 Wis. 2d 335

- Guardianship records

§ 8.10(7)(b), *as created by* 2023 Wis Act 235 (eff 4/1/2025)
§ 19.36(15), *as created by* 2023 Wis Act 235 (eff 4/1/2025)
§ 19.36(16), *as created by* 2023 Wis Act 236

- Personal records of judicial officers

§ 19.36(14), *as created by* 2023 Wis Act 126 (eff 7/1/2025)

- Personal records of election and election registration officials

4) If common-law exception to disclosure is claimed, balancing test inapplicable

St ex rel Richards v Foust 165 Wis. 2d 429 (1991)

a. Prosecutor's closed case files

Nichols v Bennett 199 Wis. 2d 268 (1996)

- But note: documents in file not integral to criminal investigation and prosecution process are not protected

St ex rel Morke v Record Custodian 154 Wis. 2d 727 (Ct. App. 1990)

b. Conviction records of inmates, when requested by prison inmate

George v
Records Custodian
169 Wis. 2d 573
(Ct. App. 1992)

c. Records of pending claims against the State

St v Panknin
217 Wis. 2d 200
(Ct. App. 1998)

d. Judge's personal notes

St ex rel Mitsubishi
Heavy Indus Am v Cir Ct
2000 WI 16
233 Wis. 2d 1

e. Unfiled pretrial discovery materials generated in a civil action

Schill v
Wis Rapids Sch Dist
2010 WI 86, ¶ 10 n4
327 Wis. 2d 572

f. Purely personal e-mails evincing no violation of law or policy

§ 19.36(3)
Juneau Cty Star-Times
v Juneau Cty
2013 WI 4, ¶¶ 13–16
345 Wis. 2d 122

5) Law firm billings to insurer under Cty's policy must be produced but may be subject to redactions

§ 19.35(1)(am)

H. Records requests under § 19.35(1)(am)—Request by individual for own records

§ 19.35(4)(c)
Seifert v Sch Dist of
Sheboygan Falls
2007 WI App 207
305 Wis. 2d 582

1) If inspection denied under § 19.35(1)(a), authority then determines right to inspection under § 19.35(1)(am)

2) Requester is individual seeking personally identifiable information pertaining to that individual in a record containing personally identifiable information maintained by an authority

Hempel v City of Baraboo
2005 WI 120
284 Wis. 2d 162

a. Right to inspect is clearly limited to personally identifiable information about the requester

Hempel v City of Baraboo
2005 WI 120
284 Wis. 2d 162

b. Affords requester rights in addition to those under § 19.35(1)(a)

Hempel v City of Baraboo
2005 WI 120, ¶ 55
284 Wis. 2d 162

c. Purpose is to allow individual to determine what information is being maintained and whether it is accurate

Hempel v City of Baraboo
2005 WI 120, ¶ 52
284 Wis. 2d 162

3) Common-law exceptions to disclosure do not apply

Hempel v City of Baraboo
2005 WI 120, ¶ 27
284 Wis. 2d 162

4) Not subject to balancing test

5) Only the following statutory exceptions apply to limit disclosure:

§ 19.35(1)(am)1.

a. Record of complaint or investigation that may lead to further proceeding

b. Record that would:

§ 19.35(1)(am)2.a.

- Endanger life or safety

§ 19.35(1)(am)2.b.

- Identify confidential informant

§ 19.35(1)(am)2.c.

- Endanger security of prison or other listed facility

§ 19.35(1)(am)2.d.

- Compromise rehabilitation of inmate

§ 19.35(1)(am)2m.

c. Actual address of participant in address confidentiality program established in § 165.68 for victims of abuse, stalking, and human trafficking

§ 19.35(1)(am)3.

d. Part of "records series" not indexed for retrieval by name, address, or other identifier

I. Costs and fees of action

§ 19.37(2)

1) Prevailing requester entitled to reasonable Atty fees, actual costs, and not less than $100 damages

Journal Times v City of Racine Bd
2015 WI 56, ¶ 86
362 Wis. 2d 577

a. Requester must show that prosecution of its mandamus action was causally related to release of record

§ 19.37(2)(a)
Friends of Frame Park, UA v City of Waukesha
2022 WI 57
403 Wis. 2d 1

b. Requester must prevail "in whole or substantial part"

In re Denial of Costs in Meinecke v Thyes
2021 WI App 58, ¶¶ 21–23, 399 Wis. 2d 1

- Obtaining a judicial order requiring access to public records meets "substantial" requirement

See CV 22, Sec. 1.D.

- In awarding fees and costs, "lodestar methodology" should be used

§ 19.37(2)(a)

c. If requester is committed or incarcerated person, no minimum amount of damages

§ 19.37(3)

2) Punitive damages available if denial was arbitrary or capricious

La Crosse Tribune v Circuit Ct (In re St v Stanley)
2012 WI App 42, ¶¶ 60–64, 340 Wis. 2d 663

3) Costs, fees, and punitive damages available only in mandamus action

CV 29: PROHIBITION

1. Definition

Wis Const art VII, §§ 4, 5, 8
§ 753.03, § 783.08–.13
§ 752.01, § 752.02
City of Madison v DWD
2003 WI 76
262 Wis. 2d 652

Extraordinary remedy by which Circuit Ct, Ct of Appeals, or Supreme Ct exercises superintending control of inferior tribunals

2. Purpose

§ 783.08
St ex rel DPI v DILHR
68 Wis. 2d 677 (1975)
St ex rel Godfrey & Kahn, SC v Cir Ct
2012 WI App 120, ¶ 48
344 Wis. 2d 610

In absence of other adequate remedies, to prevent judicial or quasi-judicial tribunal or officer or state agency from exceeding its jurisdiction or statutory authority

3. Requirements for Remedy

St ex rel Kiekhaefer v Anderson
4 Wis. 2d 485 (1958)

A. Judicial or quasi-judicial tribunal or officer clearly exceeded its jurisdiction

City of Madison v DWD
2002 WI App 199
257 Wis. 2d 348
rev'd on other grounds
2003 WI 76
262 Wis. 2d 652

Duty of inferior tribunal must be plain and refusal to perform or intent to proceed in violation of duty clear

St ex rel Kiekhaefer
v Anderson
4 Wis. 2d 485 (1958)

B. Judicial or quasi-judicial tribunal or officer committed nonjurisdictional error that causes extraordinary hardship to petitioner

St ex rel Kowaleski
v Dist Ct
254 Wis. 363 (1949)

1) Remedy traditionally reached only jurisdictional error, not judicial error

Drugsvold v
Small Claims Ct
13 Wis. 2d 228 (1961)
Keating v Inland Steel Co
(Petition of
Inland Steel Co)
174 Wis. 140 (1921)

2) Remedy may now be invoked when appeal may come too late for redress of nonjurisdictional error

St ex rel Lynch v Cty Ct
82 Wis. 2d 454, 460
(1978)

C. Lack of adequate alternative legal remedy

1) Relief by prohibition not available if adequate remedy by

St ex rel Fieldhack
v Gregorski
272 Wis. 570 (1956)
St ex rel Employers Ins
v Office of Comm'r of Ins
122 Wis. 2d 668
(Ct. App. 1985)

a. Appeal or writ of error

In re Schumaker
90 Wis. 488 (1895)

b. Proceedings in law or equity

St ex rel Schmidt v Gehrz
178 Wis. 130 (1922)

c. Certiorari

St ex rel Dore v Stoltz
42 Wis. 2d 534 (1969)

d. Habeas corpus

St ex rel Furlong v Waukesha Cty Ct
47 Wis. 2d 515 (1970)

- Ct may treat claim for remedy of prohibition as one for habeas corpus relief in appropriate circumstances

St ex rel Chiarkas v Skow
160 Wis. 2d 123 (1991)

e. Declaratory judgment

4. Non-Writ Procedure

§ 781.01

A. Remedy of prohibition available as interim or final relief in action or proceeding governed by rules of civil procedure

§ 781.01

Use of non-writ procedure does not alter nature of remedy or scope of proceedings

5. Writ Procedure

§ 783.08

A. Application for writ

1) Application must be filed in same manner as for writs of mandamus

Petition of Heil
230 Wis. 428 (1939)

2) Petitioner must be party to proceedings in inferior tribunal

St v Wescott
194 Wis. 410, 415 (1927)

3) Petition must show that relator will be substantially prejudiced unless relief is granted

B. Allowance of writ

§ 783.08

1) If application shows sufficient cause, Ct issues writ commanding lower Ct and adverse party to

a. Desist from further proceedings in matter until day fixed and further order by issuing Ct

b. Show why they should not be permanently restrained from further proceedings

§ 753.04

2) Formal writ must be returnable on date certain not more than 60 days from date of issue unless otherwise directed by Judge

§ 783.09

3) Writ is served on Ct and adverse party in same manner as writ of mandamus

C. Return

§ 783.10

1) Unless writ has been quashed, respondent must make return within time specified in writ

2) Return constitutes answer to petition and is governed by same rules as pleadings in other civil actions

§ 783.10

3) Return is made by tribunal or officer whose proceedings are stayed by writ

a. Opposing party in proceeding below may adopt return by signed writing annexed to the return, thereby becoming Def

§ 783.11

b. If adverse party below does not adopt return, its sufficiency may be argued as on order to show cause

- Petitioner may submit affidavits and other proofs controverting allegations

D. Hearing

St ex rel Gaudynski v Pruss
233 Wis. 600, 605 (1940)

Ct is not limited to record and may take additional evidence before rendering judgment

E. Judgment

1) Ct shall render judgment after hearing proofs and allegations of party

§ 783.12

2) Judgment for petitioner restraining lower tribunal is termed absolute writ of prohibition

§ 783.13

3) Judgment for respondent authorizing lower Ct and party to proceed is termed writ of consultation

CV 30: JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS (CH 227)

§ 227.40(1)

1. Judicial Review of Agency Rules—Declaratory Judgment Procedures

A. Except as in Sec. B., below, the exclusive means for judicial review of the validity of administrative rules shall be action for declaratory judgment

Midwest Renewable Energy Ass'n v Pub Serv Comm'n of Wis
2024 WI App 34
412 Wis. 2d 698

Agency action need not be called a "rule" to be deemed invalid as an unpromulgated rule

§ 227.40(2)

A. Validity of a rule may be determined in any of the following judicial proceedings:

1) Any civil proceeding by the State or any officer or agency to enforce a statute or to recover under a statute, provided:

a. Proceeding is not based on matter as to which the opposing party is accorded an administrative review or a judicial review by other statutes; and

b. Such party has failed to exercise such right to review

2) Criminal prosecutions

3) Proceedings or prosecutions for violations of Cty or municipal ordinances

4) Habeas corpus proceedings relating to criminal prosecutions

5) Proceedings under the following statutes for reviews of decisions and orders of administrative agencies if the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered: § 66.191 (1981 Stats.)—death and disability benefits for certain public employees; § 40.65(2)—duty disability and death benefits; § 106.50—open housing; § 106.52—public places of accommodation and amusement; § 303.07(7)—inmate injuries at Cty reforestation camp; § 303.21—compensation to injured prisoners; § 227.52–227.58—administrative reviews; Ch 102—worker's compensation; Ch 108—unemployment insurance; Ch 949—awards to victims of crimes

§ 227.40(1)

B. Venue is in the Circuit Ct for the Cty where:

1) Party asserting the invalidity of the rules resides or has its principal place of business, or

2) Dispute arose, if the party is a nonresident or does not have its principal place of business in Wis

§ 227.40(1)

C. Party Def: The officer or other agency whose rule is involved shall be the Def

§ 227.40(1)

D. Service of Summons: Service of the summons shall be as in § 801.11(3) and by delivering a copy to Def, if the agency is composed of more than one person, to the secretary or clerk of the agency or to any member of the agency

E. Decision

§ 227.40(1)

1) Ct shall render declaratory judgment only when it appears from complaint and supporting evidence that rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, plaintiff's legal rights and privileges

§ 227.40(1)

2) Declaratory judgment may be rendered whether or not plaintiff has first requested agency to pass upon the validity of the rule in question

Wis Prop Tax Consultants, Inc v Wis DOR
2022 WI 51, ¶¶ 13–14
402 Wis. 2d 653

3) When a declaratory-judgment claim involves a pure question of law in a nonspecialized area, it is an erroneous exercise of discretion to defer to the agency under the primary-jurisdiction doctrine. Ct must decide the issue

§ 227.40(6)

4) Upon entry of a final order in the declaratory-judgment action, Ct shall notify Legislative Reference Bureau of Ct's decision regarding validity or invalidity

§ 227.40(3)

F. In proceedings other than those under Sec. 1.B., above, when invalidity of a rule is raised, party who is asserting invalidity of rule:

1) Shall set forth the invalidity in the pleadings

2) Shall, within 30 days after service of pleadings, apply to the Ct in which such proceedings are had for an order suspending the trial of the proceeding until after a determination of the validity of the rule in a declaratory-judgment action

§ 227.40(3)(a)

3) Upon hearing of such application, if Ct is satisfied that validity of the rule is material to the issues of the case, Ct shall stay the proceedings until rendition of a final declaratory judgment by the Ct hearing the declaratory-judgment proceedings

§ 227.40(3)(b)

4) Upon entry of final order in declaratory-judgment action, party who asserts the invalidity of the rule shall formally advise the Ct of the outcome of the declaratory judgment

§ 227.40(3)(b)

5) Ct shall be bound by and apply the declaratory judgment in its proceeding

§ 227.40(3)(c)

6) Failure to set forth the invalidity of a rule in a pleading or to commence a declaratory-judgment proceeding within a reasonable time pursuant to order of the Ct or to prosecute the declaratory-judgment action without undue delay shall preclude such party from asserting or maintaining that the rule is invalid

§ 227.40(4)

G. Standards for Judicial Review of any Judicial Proceeding

1) Ct shall declare the rule invalid if it finds that it

   a. Violates constitutional provisions

   b. Exceeds the statutory authority of the agency

   c. Was promulgated without compliance with statutory rule-making procedures

2) Notwithstanding § 227.54, Ct may not restrain, enjoin, or suspend enforcement of the rule during the course of the proceeding on basis of alleged failure of agency promulgating rule to comply with § 227.114

3) If Ct finds that an agency did not adequately comply with § 227.114 (considerations for small business), Ct cannot declare the rule invalid on that basis but shall order agency to comply with that section and to propose any amendments to the rule necessary within a time specified by the Ct; rule remains in effect while agency complies with order

§ 227.40(5)

4) Joint committee for review of administrative rules shall be served with a copy of the petition in any action and with the approval of the joint committee on legislative organization, shall be made a party and be entitled to be heard

2. Judicial Review of Agency Decisions

See following sections

3. Nature of Judicial Review of Agency Decisions

A. Special proceeding—not an action at law

B. Appellate proceeding when Circuit Ct sits as Appeals Ct rather than initial forum or trier of fact

C. Created entirely by statute without counterpart in common law

D. Applies primarily to final decisions of State agencies

St ex rel Thompson
v Nash
27 Wis. 2d 183, 189–90
(1965)

E. Rules of Civil Procedure are not applicable to administrative agency proceedings unless made so by statute

§ 227.52

4. Scope of Judicial Review of Agency Decisions

Wis Envtl Decade v PSC
93 Wis. 2d 650, 657
(1980)

A. Decisions of administrative agencies not reviewable under Ch 227 unless provided by statute

B. Statutory definition of reviewable decisions: "Administrative decisions which adversely affect the substantial interest of any person"

1) Decision may be by action or inaction

2) Decision may be affirmative or negative in form

C. Decisions expressly excluded under § 227.52

1) The following agency decisions are not directly appealable to Circuit Ct

a. Dept of Revenue

b. Dept of Employee Trust Funds

c. Division of Banking

d. Office of Credit Unions

e. Chairperson of Elections Comm'n or designee

f. DWD (decisions subject to review by Labor and Industry Review Commission)

g. As otherwise provided by law

§ 227.03

D. § 227.03

1) Decisions included under Ch 227

a. Cases arising under

- § 76.38 (telephone license fees), 1993 Stats

- § 76.39 (railroad car line taxes)
- § 76.48 (license fees for electric cooperatives)

b. Rules promulgated under

- §§ 66.191, 1981 Stats, & 40.65(2) (public employee death and duty disability benefits)

Madison Landfills, Inc v Libby Landfill Negotiating Comm 188 Wis. 2d 613 (1994)

- § 289.33 (siting and expansion of solid or hazardous waste facilities)
- § 303.07(7) (compensation for injured inmate workers at reforestation camps)
- § 303.21 (compensation to injured prisoners)
- Subch II of Ch 107 (claims for mining related injuries to person or property)
- Ch 102 (worker's compensation)
- Ch 108 (unemployment insurance)
- Ch 949 (awards to crime victims)

c. Cases arising under § 108.105 (suspension of agent's privilege to appear before DWD on unemployment insurance matters)

d. Rulemaking decisions affecting protection against discrimination in a public place of accommodation or amusement under § 106.52

2) Decisions excluded under Chapter 227

a. Provisions of the following statutes that are inconsistent with title 45 of the Code of Federal Regulations do not apply to decisions arising under Ch 49 (relating to public assistance):

- § 227.42 (conditions under which hearing request results in a contested hearing)
- § 227.44 (procedure in contested cases)

- § 227.49 (rehearing petitions in contested cases)

b. DWD decisions relating to housing discrimination under § 106.50, except as provided in § 106.50(6)

c. Contested case provisions of Ch 227 do not apply to

- Proceedings involving the revocation of community supervision or aftercare supervision under § 938.357(5)
- Proceedings involving the revocation of parole, extended supervision, or probation, the grant of probation, prison discipline, or mandatory release under § 302.11 or
- Any other proceeding involving the care and treatment of a resident or an inmate of a correctional institution

d. Decisions of Claims Bd, except decisions under §§ 775.05(5), 775.06(7), and 775.11(2)

e. Orders of the Elections Comm'n under § 5.06(6)

f. Determinations made by the secretary of administration or the secretary of revenue under § 229.50(1)

§ 73.015(2), § 73.01

E. Determinations of the Tax Appeals Comm'n

F. Nonreviewable decisions under case law

Container Life Cycle Mgmt v Wis DNR
2022 WI 45, ¶ 35
402 Wis. 2d 337
Pasch v Dep't of Rev
58 Wis. 2d 346, 353–58
(1973)

1) Preliminary, interlocutory, interim, or nonfinal decisions (Ripeness)

a. Finality is a consideration in determining whether "substantial interests" affected but is not sole indicator of reviewability

b. Labels not necessarily determinative

Wis Envtl Decade v PSC
93 Wis. 2d 650, 657–59
(1980)

2) Decisions not supported by a record or not based on findings of fact and conclusions of law

Vermont Yankee
Power Corp v NRDC
98 S. Ct. 1197 (1978)

3) Decisions on management of cases before the agency

Madison Landfills, Inc
v DNR
180 Wis. 2d 129, 138–40
(Ct. App. 1993)

5. Statutory Elements of Reviewable Agency Decision

§ 227.52
Container Life Cycle
Mgmt v Wis DNR
2022 WI 45
402 Wis. 2d 337
Kimberly Area Sch Dist
v LIRC
2005 WI App 262
288 Wis. 2d 542

A. Final decision

§ 227.47

B. In writing accompanied by findings of fact and conclusions of law

§ 227.52

C. Adversely affecting the substantial interest of any person

§ 227.53(1)

D. Review sought by person aggrieved by decision

6. Standing to Seek Review of Agency Decision

A. Not necessary for petitioner to have been party to prior proceeding before agency

B. Test for standing (person aggrieved) is whether

Waste Mgmt of Wis
v DNR
144 Wis. 2d 499 (1988)

1) Decision causes injury to interest of petitioner, and

Friends of Black River
Forest v Kohler Co
2022 WI 52, ¶ 25
402 Wis. 2d 587

2) Interest asserted is one protected, recognized, or regulated by law

Fulton Found v
Dep't of Taxation
13 Wis. 2d 1 (1961)

C. Agency has no standing to attack constitutionality of statute

St ex rel City of La Crosse
v Rockwell

25 Wis. 2d 228 (1964)

1) Exception when

a. Private party is litigant, and

b. Issue is of great public concern, and

c. Challenge is within agency's official duty or agency will be personally affected if it fails to mount attack

§ 227.53

7. Commencing Judicial Review of Agency Decision

A. Exclusivity

Wis Envtl Decade v PSC
79 Wis. 2d 161, 170
(1977)

1) Procedures for judicial review under Ch 227 are exclusive

§ 227.02
Wagner v
St Med Examining Bd
181 Wis. 2d 633 (1994)

2) Statutes relating to procedures in civil actions that are not in conflict with Ch 227 are applicable

B. Strict compliance

Cudahy v Dep't of Rev
66 Wis. 2d 253, 257–62
(1974)

1) Right to appeal under Ch 227 is dependent on strict compliance with its provisions

2) Failure to so comply deprives Circuit Ct of subject-matter jurisdiction

§ 227.53

C. Pleadings

Tatum v LIRC
132 Wis. 2d 411, 424
(Ct. App. 1986)

1) Petition for review is initial pleading

No summons or complaint

§ 227.53

2) Notice of appearance is responsive pleading filed by all other parties

No answer

D. Parties

§ 227.53(1)

1) Petitioner is person who commences proceeding

§ 227.53(1)

2) Named respondent is agency whose decision is being challenged, unless otherwise specified under § 227.53(1)(b)

§ 227.53(1)(d)
§ 227.47

3) Other parties required to be served with petition for review must be listed in agency's decision and may participate as matter of right as respondent (See **Sec. E.**4) below)

§ 227.53(2)

Must file notice of appearance

§ 227.53(1)(d)

4) Other interested persons may intervene, if permitted by Ct

§ 227.53(1)(a)

E. Commencement of proceeding

1) Commenced by service of petition for review on agency and filing in office of Clerk of Ct

All Star Rent A Car v DOT
2006 WI 85
292 Wis. 2d 615

"Agency" to be served pursuant to § 227.53(1)(a) is ambiguous, but Ct may consider other information to determine whether petitioner acted reasonably

Weisensel v DHSS
179 Wis. 2d 637, 643
(Ct. App. 1993)

2) Service on agency or one of its officials may be personal or by certified mail

a. Service upon agency's Atty of record is not service upon the agency

b. Note: Under § 227.53(1)(c), service on party other than agency may be accomplished by serving that party's Atty of record. See para. 4) below

3) Filing must be physical filing in office of Clerk for Cty where proceedings to be held

§ 227.53(1)(c)

4) Copies of petition must be served within 30 days after commencement of appeal upon all parties who appeared before the agency or the party's Atty of record

Service on parties other than the agency may be personal, by certified mail, or by first-class mail if service timely admitted in writing

§ 227.53(1)(c)

5) Ct may not dismiss proceeding for review solely because of failure to serve copy of petition upon a party or party's Atty of record unless petitioner fails to serve on person listed as party for purposes of review in the agency's decision under § 227.47 or person's Atty of record

F. Timeliness

§ 227.53(1)(a)
Cudahy v
Dep't of Revenue
66 Wis. 2d 253, 259–62
(1974)
Wis Power & Light Co
v PSC
2006 WI App 221
296 Wis. 2d 705

1) Petition for review must be filed and served on agency within 30 days after service of agency decision under § 227.48. Goes to subject-matter jurisdiction

Madison Metro Sch Dist
v Evers
2014 WI App 109
357 Wis. 2d 550

a. The Saturday service extension rule in § 990.001(4)(c) applies when the agency does not have official Saturday office hours and extends service deadline to the next business day

Johnsonville Sausage
v Dep't of Revenue
113 Wis. 2d 7
(Ct. App. 1983)

b. Service of agency decision by mail deemed complete upon mailing, not upon receipt. 30 days to perfect review proceedings commences to run day after mailing

§ 344.03(2)

c. Exception to 30-day requirement—DOT proof of financial responsibility

§ 227.53(1)(a)

2) If rehearing before agency was requested, petition must be served and filed within 30 days after service of agency order disposing of rehearing or after denial of rehearing by operation of law under § 227.49

3) 30 days begins on day after decision is mailed or personally served by agency

Currier v DOR
2006 WI App 12, ¶ 17
288 Wis. 2d 693

4) Filing is accomplished when physically delivered to and received by the relevant authority

G. Responsive pleadings

§ 227.53(2)

1) Notice of appearance must be served on petitioner by agency within 20 days after service of petition for review

Wagner v
St Med Examining Bd

181 Wis. 2d 633, 642, 644
(1994)

a. 20-day provision is mandatory, not merely directory

b. Remedies for noncompliance with 20-day provision include mandamus, contempt, and refusal to consider statement of agency position

§ 227.53(2)

2) Notice of appearance must state respondent's position on each material allegation in petition for review

Must also state respondent's position with respect to affirmance, vacation, or modification of order or decision under review

§ 227.53(2)

3) Respondents other than named respondent (agency) must serve their notice of appearance on named respondent and AG as well as on petitioner

§ 227.53(1)(a)3.

H. Venue

Shopper Advertiser v Dep't of Revenue
117 Wis. 2d 223, 231
(1984)

1) If petitioner is resident of Wis, venue in Circuit Ct for Cty where petitioner resides

2) If petitioner is nonresident, venue in Cty where property affected by decision is located or, if no affected property, then in Cty where dispute arose

3) If petitioner is agency, venue in Cty where respondent resides, except as provided in §§ 73.0301(2)(b)2., 77.59(6)(b), 108.227(6), 182.70(6), and 182.71(5)(g)

4) Parties may stipulate to venue in any Cty, if Ct for desired Cty agrees

5) If two or more petitions for review of same decision filed in different counties, Judge for Cty in which petition filed first determines venue

a. May order transfer or consolidation where appropriate

Committee Comment

- Committee views "where appropriate" language in § 227.53(1)(a)3. as referring to geography, not to circumstances under which change in venue is appropriate

I. Burdens

St v McFarren
62 Wis. 2d 492, 499–500
(1974)

Sterlingworth Condo Ass'n v St
205 Wis. 2d 710
(Ct. App. 1996)

1) Burden of going forward and burden of persuasion generally on moving party

8. Record in Judicial Review of Agency Decision

§ 227.57

A. Ct's decision in judicial review proceeding is based on record established before the agency that made challenged decision

1) Expansion of record is allowed only in limited, prescribed circumstances

2) Trial of fact before Ct occurs only in two specific instances

a. Factual basis for determination to stay order (See **Sec. 9.B.**, *infra*)

b. Taking evidence on procedural irregularities (See **Sec. 9.E.**, *infra*)

§ 227.55

B. Transmittal of record by agency

1) Agency must transmit record to Ct within 30 days after service of petition for review, unless Ct allows more time

Wagner v St Med Examining Bd
181 Wis. 2d 633, 642, 644
(1994)

a. Unless extended by Ct, 30-day provision is mandatory, not merely directory

b. Remedies for noncompliance include mandamus, order for production, and contempt

2) Parties may stipulate to shorten record

a. If party other than agency refuses to stipulate to limit record, Ct may tax additional costs against that party

3) Record can be typed or printed

a. Can be the original or copy

b. Ct can order that original of any exhibit accompany record

§ 227.55

C. Contents of record

1) Shall be entire record of proceedings, including all pleadings, notices, testimony, exhibits, findings, decisions, orders, and exceptions

2) If agency proceeding was "contested case," record must contain, at a minimum, all items specified in § 227.44(6)

D. Additions to record

1) Ct can require or permit corrections or additions to record

§ 902.03(1)(b), (2)

2) Ct can take judicial notice of

a. Published State agency rules

b. State agency orders

c. Rules and orders of federal agencies, if requested by a party

§ 227.56(1)

3) Upon application, Ct can order agency to take additional evidence. *See infra* **Sec. 9.E.1**)

9. Motions in Judicial Review of Agency Decision

Committee Comment

A. Ch

227 provisions regarding motions are incomplete

1) Case law holds that procedures under Chs 800–809 are generally inapplicable to judicial review proceedings

2) Practice has been to consider certain motions, in addition to those expressly contained in Ch 227, presumably under implied power of Ct as an appellate body

§ 227.54

B. Motion to stay agency decision pending review

1) Ct may order stay of enforcement of agency decision on such terms as it deems proper

2) Express provisions of §§ 196.43, 253.06, and 448.02(9) control when applicable

Recommendation

3) Standards for granting preliminary injunctive relief in civil actions have generally been considered and applied by Cts under § 227.54

4) Factual basis for decision to stay order

a. Agency record may not be filed yet, and, if filed, may not contain sufficient information relevant to whether stay should be granted

Recommendation

b. Practice has been to consider stay based on facts established in affidavits, although evidentiary hearing may be held before Ct, if necessary

- Evidence presented at hearing or in affidavit with respect to stay is not to be considered as part of record upon which agency decision is reviewed

C. Motion to dismiss for lack of standing

§ 227.56(3)

1) Any respondent may move to dismiss on ground that petition to review, on its face, does not state facts sufficient to show that petitioner is person aggrieved by agency decision

2) Motion must be made within 20 days after time specified for filing all notices of appearance under § 227.53

3) Upon hearing, Ct may grant petitioner leave to amend petition, if amendment was served on all respondents before hearing

4) Ct can rule on amended petition without further or other motion to dismiss being brought

Wis Envtl Decade v PSC
69 Wis. 2d 1, 8 (1975)

5) For purposes of motion, all facts properly in petition for review are deemed true

Committee Comment

6) No counterpart in Ch 227 to motion to dismiss for failure to state a claim upon which relief can be granted

a. Practice has been to raise those kinds of issues either under § 227.56(3), or under motion to dismiss for lack of jurisdiction

- Discussed at **Sec. 9.F.**, *infra*

D. Motion to intervene

§ 227.53(1)(d)
Town of Delavan v
City of Delavan

160 Wis. 2d 403, 415
(Ct. App. 1991)

1) Discretionary with reviewing Ct

Town of Delavan v
City of Delavan
160 Wis. 2d 403, 415
(Ct. App. 1991)

2) Factors

a. Whether potential intervenor has standing

b. Whether intervenor's interests are already well represented

CUB v PSC
2003 WI App 206
267 Wis. 2d 41

3) May not circumvent dismissal of petition by attempting to intervene

E. Motions for taking of additional evidence

§ 227.56(1)

1) Motion to take additional evidence before agency

a. Upon application, Ct can order agency to take additional evidence

- If before date set for oral argument on petition for review
- If Ct satisfied that additional evidence is material
- If there were good reasons for failing to present it to the agency

b. Ct can set terms upon which additional evidence to be taken

c. Agency may modify its findings and decision based on additional evidence

d. Agency must file additional evidence and any new or modified findings or decision with reviewing Ct

§ 227.57(1)
Cty of Dane v PSC
2022 WI 61
403 Wis. 2d 326
(plurality decision)

2) Motions for taking evidence in Ct on procedural irregularities

a. Ct may order hearing to take evidence on irregularities in procedure before agency

§ 227.50
Marder v Bd of Regents
2005 WI 159
286 Wis. 2d 252

- E.g., ex parte communications

b. Petition for review must allege irregularities in procedure before agency

c. Ct can grant leave for taking of depositions and written interrogatories under Ch 804 before hearing on procedural irregularities

F. Motions not specifically provided for in Ch 227

Wis Envtl Decade v PSC
79 Wis. 2d 161, 170–71
(1977)

1) Motion for summary judgment not allowed under Ch 227

Wagner v
St Med Examining Bd
181 Wis. 2d 633, 644
(1994)

2) Motion for default judgment not allowed under Ch 227

3) Motion to dismiss on ground of mootness

Wis Envtl Decade v PSC
79 Wis. 2d 161, 171–72
(1977)

a. Although not specifically provided for in Ch 227, case law indicates that motion to dismiss for mootness may be granted when appropriate

b. Ct may look at facts outside record in considering motion

4) Motion to dismiss on ground that Ct lacks jurisdiction

Cudahy v
Dep't of Revenue
66 Wis. 2d 253, 256–57
(1974)

a. May be granted on grounds of failure to meet procedural requirements

Friends of the Earth
v PSC
78 Wis. 2d 388, 389, 415
(1977)

b. Nonreviewable order

5) Motion to dismiss for failure to exhaust administrative remedies

Nodell Inv Corp v
City of Glendale
78 Wis. 2d 416, 422
(1977)

a. If a statute sets forth review of administrative action and Ct review of administrative decision, such remedy is exclusive and must be employed before other remedies are used

Fazio v Dep't of
Emp Tr Funds
2002 WI App 127
255 Wis. 2d 801

b. Futility exception: Exhaustion is not required if administrative remedy is not adequate

Committee Comment

- When futility exception becomes an issue, examine agency statutes to see whether there is an express or necessarily implied grant of power from legislature under which agency may grant adequate relief

Committee Comment

6) Following motions, although not expressly provided for in Ch 227, have been considered by Cts in judicial review proceedings

a. Motion to strike

b. Motion to make pleadings more definite and certain

c. Motion for change of venue

St ex rel Delavan v
Walworth Cty Cir Ct
167 Wis. 2d 719, 723–24
(1992)

d. Motion for substitution of Judge

e. Motion with respect to scheduling of briefing and determination of case

Metro Greyhound
Mgt Corp v Racing Bd
157 Wis. 2d 678, 698–99
(Ct. App. 1990)

f. Motion for reconsideration

Gould v DHSS
216 Wis. 2d 356
(Ct. App. 1998)

g. Motion for non-mutual offensive use of issue preclusion (But Ct rejected application of issue preclusion in *Gould* case)

10. Pretrial Practice

A. Prehearing conference not required and generally inappropriate because no trial of fact

B. Briefing schedule generally set by Ct after time for all notices of appearance to be filed has passed

Lee v LIRC
202 Wis. 2d 558
(Ct. App. 1996)

Ct may dismiss case if party seeking review does not comply with Ct order to file a brief

Union State Bank
v Galecki
142 Wis. 2d 118, 126
(Ct. App. 1987)

C. Oral argument may be scheduled at discretion of Ct, but not required

D. Case is ready for determination after last brief filed, or, if oral argument scheduled, after argument

11. Scope of Review of Agency Decision

§ 227.57(1)

A. Judicial review is conducted without jury and is confined to record filed by agency, unless hearing on procedural irregularities has been held

Discussed in **Sec. 9.E.**, *supra*

§ 227.57(2)
Wis Envtl Decade v PSC
79 Wis. 2d 161, 170
(1977)

B. Not trial de novo

Ct must affirm agency, unless it finds ground to do otherwise under § 227.57

Weibel v Clark
87 Wis. 2d 696, 704
(1979)
City of LaCrosse v DNR
120 Wis. 2d 168, 178
(Ct. App. 1984)

C. Burden of proof

Burden is on party seeking to overturn agency action, not on agency to justify its action

§ 227.57(3)

D. Ct must consider and treat separately (*See* **Secs. E.–I.**, *infra*)

1) Issues of agency procedure

2) Interpretations of administrative rule or regulation

3) Interpretations of law

4) Determinations of fact

Madison Teachers, Inc v WERC
218 Wis. 2d 75, 84
(Ct. App. 1998)

Agency characterization of determination as a finding of fact or conclusion of law does not bind a reviewing Ct

5) Determinations of policy within scope of agency's delegated discretion

§ 227.57(4)

E. Irregularities in agency procedure

1) Ct must find

a. Error in procedure or failure to follow prescribed procedure

b. Error must be material

Guthrie v WERC
111 Wis. 2d 447 (1983)

c. Error must have impaired fairness of proceedings or correctness of action

2) Ct must remand to agency for further action if above found

DaimlerChrysler v LIRC
2007 WI 15, ¶ 11
299 Wis. 2d 1
State v Busch
217 Wis. 2d 429 (1998)

F. Interpretations of administrative rule or regulation

Administrative agency's interpretation of its own rules or regulations entitled to controlling deference unless plainly erroneous or inconsistent with the regulations

§ 227.57(5), (10), (11)

G. Interpretations of law

Note: In *Tetra Tech EC, Inc v Dep't of Revenue*, 2018 WI 75, 382 Wis. 2d 496, a majority of the Wis Supreme Ct ended the long-held practice of Cts deferring to administrative agencies' interpretation of statutes and regulations under certain conditions. While there was fractured support for the lead opinion of Justice Kelly, there were four justices who supported the following key paragraph in the lead opinion's conclusion:

Tetra Tech EC, Inc v Dep't of Revenue

2018 WI 75, ¶ 3
382 Wis. 2d 496 (lead op.)

> We have also decided to end our practice of deferring to administrative agencies' conclusions of law. However, pursuant to [§] 227.57(10), we will give "due weight" to the experience, technical competence, and specialized knowledge of an administrative agency as we consider its arguments.

But see Amazon Logistics, Inc v LIRC
2023 WI App 26
407 Wis. 2d 807
pet to rev dismissed

> The lead opinion extensively criticized the prior use of "due weight deference," but that portion of the lead decision only had support of two justices. As a result, there remains uncertainty as to how lower Cts are to afford "due weight" under § 227.57(10), and this issue will likely be analyzed further by Cts.

Local 695 v LIRC
154 Wis. 2d 75, 82 (1990)

1) Ct not bound by agency's interpretation of law

Morris v Emp Tr Funds Bd
203 Wis. 2d 172, 186–87
(Ct. App. 1996)

a. Ct owes no deference to unreasonable interpretation by agency

Harnischfeger v LIRC
196 Wis. 2d 650, 662
(1995)

b. Agency interpretation is unreasonable if

Gorchals v DHFS
224 Wis. 2d 541
(Ct. App. 1999)

- It directly contravenes the words of the statute or rule, or
- It is clearly contrary to legislative intent, or
- It is without rational basis

Rock-Koshkonong Lake Dist v DNR
2013 WI 74, ¶ 61
350 Wis. 2d 45

c. Cts are not bound by an agency's decision concerning the scope of its own power

§ 227.57(5)
Geen v LIRC
2002 WI App 269, ¶ 32
258 Wis. 2d 498

2) If Ct finds agency action was based on incorrect interpretation of law, Ct can

a. Set aside or modify agency action, if Ct finds that correct interpretation of law compels a particular action

b. Remand case to agency for further action under correct interpretation of law

H. Reviewing findings of fact

§ 227.57(6)

1) Agency findings must be supported by substantial evidence in the record

Kitten v DWD
2002 WI 54, ¶ 5
252 Wis. 2d 561

a. Test: Whether, taking into account all evidence in the record, "reasonable minds could arrive at the same conclusion as the agency"

Yao v Bd of Regents
2002 WI App 175
256 Wis. 2d 941

- Reviewing Ct not to search for evidence that impeaches agency finding

Hamilton v DILHR
94 Wis. 2d 611, 617–18
(1980)

- Ct must affirm agency finding, even if against weight or clear preponderance of evidence, as long as reasonable person could reach same conclusion based on evidence in entire record

Painter v
Dentistry Examining Bd
2003 WI App 123
265 Wis. 2d 248

- Ct does not weigh conflicting evidence on an issue, but only looks for credible evidence to sustain agency's finding

Michels Pipeline Constr
v LIRC
197 Wis. 2d 927, 931
(Ct. App. 1995)

b. Factual findings include the drawing of one of several reasonable inferences from undisputed facts

§ 227.57(6)

c. Ct must not substitute its judgment for that of agency as to weight of evidence on any disputed finding of fact

§ 227.57(6)

2) Ct shall set aside or remand a contested case if

Ct finds agency action depends on any finding of fact not supported by substantial evidence in record

Crystal Lake Cheese
Factory v LIRC
2003 WI 106
264 Wis. 2d 200
Epstein v Benson
2000 WI App 195
238 Wis. 2d 717

3) Before reversing hearing examiner's finding based on credibility assessment, due process requires that agency confer with examiner

a. Record must affirmatively show agency had benefit of examiner's personal impressions of witness credibility

§ 227.46(2)

b. Record must include explanation for any variance from hearing examiner's determination

§ 227.57(7)

4) If agency decision depends on facts determined without hearing, Ct can

a. Set aside, modify, or order agency action, if facts compel particular action as a matter of law, or

RW Docks & Slips v DNR
145 Wis. 2d 854, 862–63
(Ct. App. 1988)

b. Remand for further proceedings

5) What constitutes "entire record"

a. Noncontested case

- Record is all evidence or information before agency, regardless of whether evidence adduced at agency hearing or otherwise

Westring v James
71 Wis. 2d 462, 472–75
(1976)

- "Legislative" fact-finding may be based on evidence or information obtained outside of hearing record

- Legislative facts do not apply to a particular party, but are of generalized nature bearing on questions of law, policy, and discretion

b. Contested case

- "Adjudicative" fact-finding must be based on evidence in contested case record as defined in § 227.44

See 2 Kristin E Hickman & Richard J Pierce, Jr, *Administrative Law Treatise* ch 10
(6th ed 2019)

- Adjudicative facts are about parties and their activities, businesses, and properties—roughly the kind of facts that go to a jury

§ 227.57(8)
Barnes v DNR
184 Wis. 2d 645 (1994)

I. Determinations within agency's delegated discretion

In re Altshuler
171 Wis. 2d 1, 8 (1992)

1) Agency exercise of discretion reviewed in same manner as review of exercise of discretion by Circuit Ct

Marten Transp Co v Hartford Specialty Co
194 Wis. 2d 1, 13 (1995)

a. Standard: Whether the exercise was based on the relevant facts by applying a proper legal standard, and

b. Exercise represents a determination that a reasonable person could reach

2) Ct cannot substitute its judgment for that of agency on issue of discretion

3) Grounds for review of agency discretion

a. Whether agency's action is outside range of discretion delegated to it by law

b. Whether action violates constitutional or statutory provision

c. Whether action is inconsistent with agency rule, officially stated agency policy or prior agency practice, unless deviation explained to satisfaction of Ct

- Formerly referred to as "arbitrary and capricious" standard

Holtz & Krause, Inc v DNR
85 Wis. 2d 198, 211 (1978)

- Test is defined in case law as whether action is result of unconsidered, irrational choice

§ 227.57(9)

4) Relief specified is to reverse or remand

Keip v DHFS
2000 WI App 13
232 Wis. 2d 380

Dollar losses claimed as result of agency ruling not recoverable

§ 227.57(10)
Healthcare Servs Grp v Dep't of Rev
2018 WI App 48, ¶ 11
383 Wis. 2d 699

J. Ct must accord due weight to experience, technical competence, specialized knowledge, and discretionary authority of agency

§ 227.57(11)

K. Ct accords no deference to agency's interpretation of law on review of agency action or decision

§ 227.57(12)

L. Right of petitioner to challenge constitutionality of any act or its application to petitioner not foreclosed by fact that petitioner holds license, permit, or privilege under the act

Seebach v PSC
97 Wis. 2d 712, 724
(Ct. App. 1980)

M. Doctrine of "harmless error" applies to judicial review cases, particularly in matters of procedural error

§ 227.57(9)

N. Discretion as to relief

1) Ct can provide whatever relief is appropriate, regardless of original form of petition

2) If Ct sets aside or remands case to agency for further proceedings, it can enter interlocutory order to preserve interests of any party and public, pending further proceedings or agency action

Racine Educ Ass'n
v Comm'r of Ins
158 Wis. 2d 175, 182
(Ct. App. 1990)

O. Party seeking relief from agency decision has burden of proof

12. Judgment

Committee Comment

A. Practice has been for Ct to render decision in memorandum opinion

B. Judgment may be rendered as part of memorandum decision or separately

Ct may prepare its own judgment or may direct party to prepare judgment for Ct's approval

Wis DOT v
Wis Pers Comm'n
176 Wis. 2d 731 (1993)

C. Costs and Atty fees may not be taxed against the State without express statutory authorization

1) For example, when specified parties who prevail against state agency may recover costs and Atty fees, see §§ 227.485, 814.245, 814.25, and 227.483

§ 227.485(5)
Gordon v
St Med Examining Bd
225 Wis. 2d 552
(Ct. App. 1999)

2) Failure to apply for award of costs within 30 days after service of proposed decision is fatal to jurisdiction

13. Remittitur

A. After time for appeal has run, record is returned to agency by Clerk of Ct

§ 227.58

B. Time for appeal is same as in civil cases, § 808.04(1)

CV 31: WORKER'S COMPENSATION

1. Judicial Review

§ 102.23(1)(a)

A. Circuit Ct review prescribed by statute is exclusive

Vidal v LIRC
2002 WI 72, ¶ 26
253 Wis. 2d 426

B. However, common-law certiorari may be granted in "exceptional case" when statutory review is inadequate

§ 102.23(1)(a)

C. The findings of fact made by LIRC acting within its powers shall, in the absence of fraud, be conclusive

2. Commencement of Action

§ 102.23(1)(a)1., 2.

A. Parties to the Judicial Review

1) Any party aggrieved by the order or award may commence an action in the Circuit Ct for review

2) LIRC shall identify in the order or award the persons that must be made parties to an action for review of the order or award

3) LIRC and all parties identified by LIRC in A.2) shall be named as Defs

4) If the Circuit Ct determines that any other person is necessary for the proper resolution of the action, the Circuit Ct may join that person as a party to the action, unless joinder of the person would unduly delay the resolution of the action

§ 102.23(1)(a)

B. Summons and complaint

1) Action commenced by serving, and filing, summons and complaint within 30 days after date of LIRC's order

a. If the Circuit Ct is satisfied that a party in interest has been prejudiced because of an exceptional delay in the receipt of a copy of any order, the Circuit Ct may extend the time in which an action may be commenced by an additional 30 days

§ 102.23(1)(b)

b. Complaint must be served with authenticated copy of summons

c. Complaint need not be verified

d. Grounds for appeal should be specifically stated in complaint

Selaiden v
Columbia Hosp
2002 WI App 99
253 Wis. 2d 553

2) Technical defects in complaint may not be fatal

§ 102.23(1)(b)

3) Service upon LIRC or an agent authorized by LIRC to accept service constitutes complete service on all parties

a. As many copies of the summons and complaint as there are Defs must be left with the person (LIRC or the authorized agent) accepting service

b. LIRC shall mail one copy to each other Def

Cruz v DILHR
81 Wis. 2d 442, 449
(1978)

4) Time limits and joinder requirements are jurisdictional, and strict compliance is required

§ 102.23(1)(a)

a. LIRC must identify in its order or award the persons that must be made parties to an action for review of the order or award

Gomez v LIRC
153 Wis. 2d 686, 691
(Ct. App. 1989)

b. Any defects are jurisdictional in nature

C. Venue

§ 102.23(1)(a)3.

1) Venue is generally in Ct of Cty where plaintiff resides, BUT:

§ 102.23(1)(a)3.

2) If plaintiff is state agency, the proceedings shall be in the Circuit Ct of the Cty where Def resides

Aparacor, Inc v DILHR
97 Wis. 2d 399, 406–07
(1980)

3) If State is the plaintiff and Def does not reside in Wis, then § 801.50 controls venue

§ 102.23(1)(a)3.

4) Action may be brought in any Cty if the parties stipulate

D. Responsive Pleadings and Motions

§ 102.23(1)(c)

1) LIRC must serve its answer within 20 days after service of complaint

2) Other Defs may serve answer within same time period

§ 102.23(1)(cm)

EXCEPT if Def is insurance company, Def may serve answer within 45 days after service of complaint

3) Answer may include counterclaim or cross-complaint asking for review of LIRC order

Ellis v Dep't of Admin
2011 WI App 67, ¶¶ 14–22. 333 Wis. 2d 228

4) Claimant cannot obtain default judgment against LIRC if employer timely filed answer

Rathjen v Indus Comm'n
233 Wis. 452, 456–57 (1940)

5) Any party Def, including LIRC, may make motion to dismiss

3. Pretrial Practice

§ 102.23(1)(d)

A. LIRC must make return to Ct of agency record, including transcript of testimony

§ 802.10(1)

B. Neither scheduling conference nor pretrial conference required

1) After record filed by LIRC, usual practice is for Ct to set briefing schedule

2) The action may thereupon be brought on for hearing before the Ct upon the record by any party on 10 days' notice to the other parties

C. If motion to dismiss filed by any Def, it should be handled and decided pursuant to standard motion practice before case heard on merits

4. Hearing Practice and Procedure

§ 102.23(1)(d)
Int'l Harvester Co v Indus Comm'n
157 Wis. 167, 172 (1914)

A. Ct acts in appellate capacity on record made before agency

§ 102.23(1)(a)1.

1) The findings of fact made by LIRC acting within its powers shall, in the absence of fraud, be conclusive

2) No trial de novo

3) Oral argument not required

Comment

Cases generally submitted for decision on briefs only

B. Scope of Review

§ 102.23(1), (6)
Abbyland Processing
v LIRC
206 Wis. 2d 309
(Ct. App. 1996)

1) Findings of fact made by LIRC are conclusive on review if supported by credible and substantial evidence

§ 102.23(6)

a. If LIRC's order or award depends on any fact found by LIRC, the Ct shall not substitute its judgment for that of LIRC as to the weight or credibility of the evidence on any finding of fact

§ 102.23(6)

b. The Ct may set aside LIRC's order or award if it depends on any material and controverted finding of fact that is not supported by credible and substantial evidence

Bucyrus-Erie Co
v DILHR
90 Wis. 2d 408, 418
(1979)

- Credible and substantial evidence is such relevant evidence as reasonable mind might accept as adequate to support a conclusion

RT Madden, Inc
v DILHR
43 Wis. 2d 528, 547
(1969)

- Assumption in test is that evidence is

  — Relevant

  — Evidentiary and not conclusion of law

  — Not so completely discredited by other evidence that Ct would find it incredible as matter of law

Princess House, Inc
v DILHR
111 Wis. 2d 46, 54 (1983)

c. If there is relevant, credible, and probative evidence on which a reasonable person could rely to reach a conclusion, findings must be upheld

Heritage Mut Ins Co
v Larsen
2001 WI 30, ¶ 24
242 Wis. 2d 47

d. Findings must be upheld even though contrary to great weight and clear preponderance of the evidence

§ 102.23(1)(e)

2) The Ct may confirm or set aside such order or award and any judgment that may theretofore have been rendered on the order or award, but only upon the following grounds:

a. That LIRC acted without or in excess of its powers

b. That the order or award was procured by fraud

c. That the findings of fact by LIRC do not support the order or award

Wright v LIRC
210 Wis. 2d 289
(Ct. App. 1997)

3) LIRC acts in excess of its powers and offends due process when it modifies ALJ's findings of fact to determine an issue not noticed for hearing and not fully litigated by the parties

Hakes v LIRC
187 Wis. 2d 582
(Ct. App. 1994)
Conradt v
Mt Carmel Sch
197 Wis. 2d 60, 73
(Ct. App. 1995)

4) When LIRC decision overturns findings of hearing examiner, due process requires that LIRC must, after consulting with hearing examiner

a. Submit memorandum opinion stating basis for rejection of examiner's findings

b. State reason why it made own independent finding

5) Rejection of uncontroverted medical opinion

Leist v LIRC
183 Wis. 2d 450 (1994)

a. Regarding work-related origin of injury, agency's denial of claim must be grounded in reasoned analysis and credible evidence

Kowalchuk v LIRC
2000 WI App 85
234 Wis. 2d 203

b. Regarding existence of compensable injury, agency's decision upheld when agency found history given by employee to be incredible

Anheuser Busch
v Indus Comm'n
29 Wis. 2d 685, 692
(1966)

6) Findings before Ct on review are those of LIRC, not those of hearing examiner

Burton v DILHR
43 Wis. 2d 218, 222
(1968)

LIRC is primary fact-finder. Hearing examiner's decision is recommendation to LIRC

7) Testimony of treating physician not entitled to greater weight than testimony of any nontreating physician

Tetra Tech EC, Inc
v Dep't of Revenue
2018 WI 75
382 Wis. 2d 496
See also § 227.57(11)

C. Legal interpretations of LIRC not binding on reviewing Ct

1) In *Tetra Tech*, a majority of the Wis Supreme Ct ended the long-held practice of Cts deferring to administrative agencies' interpretation of statutes and regulations under certain conditions. See Note discussing the case in **CV 30, Sec. 11.G.** Footnote 8 of the lead opinion states that "[t]his decision applies to judicial review of all administrative agency decisions"

2) Ct will give no deference to LIRC legal interpretation when

a. Interpretation contravenes statutory language, is contrary to legislative intent, or is otherwise unreasonable or without rational basis

Doering v LIRC
187 Wis. 2d 472, 477
(1994)

b. Interpretation conflicts with prior Wis Supreme Ct case law

Schenkoski v LIRC
203 Wis. 2d 109
(Ct. App. 1996)

c. Interpretation concerns LIRC's statutory authority

Tetra Tech EC, Inc
v Dep't of Revenue
2018 WI 75, ¶ 3,
382 Wis. 2d 496 (lead op.)
Mueller v LIRC
2019 WI App 50, ¶ 17
388 Wis. 2d 602

3) In evaluating the persuasiveness of an administrative agency's legal interpretation, Ct should give "due weight" to the agency's experience, technical competence, and specialized knowledge

§ 102.23(2)
Amsoil, Inc v LIRC
173 Wis. 2d 154, 167
(Ct. App. 1992)

D. Ct to disregard harmless error on part of agency

Davis v Indus Comm
22 Wis. 2d 674, 677–78
(1964)

E. Usual practice is for Ct to render memorandum opinion stating reasons for its decision

RT Madden, Inc
v DILHR

43 Wis. 2d 528, 536
(1969)

1) Ct has no authority to make own findings of fact

Hopp v LIRC
146 Wis. 2d 172, 177
(Ct. App. 1988)

2) Ct has no power to grant new hearing on ground of newly discovered evidence

§ 102.23(1)(e)
M&M Realty v
Indus Comm'n
267 Wis. 52, 58 (1954)

3) Permitted dispositions

a. Confirm entire order

b. Set aside entire order

c. Confirm correct part of order and set aside erroneous part

§ 102.25

5. Judgment

Bearns v DILHR
102 Wis. 2d 70, 76–77
(1981)

A. Confirms or sets aside LIRC order

1) Should not contain findings of fact and conclusions of law

2) Usual practice is for Ct to prepare and enter proper judgment or direct prevailing party to do so in its memorandum opinion

§ 102.24(1)

B. If LIRC order set aside, Ct may either remand record for further proceedings or enter proper judgment upon findings of LIRC

§ 102.24(2)

If parties decide to settle case, Ct may by stipulation and order remand record for purpose of having proposed settlement approved by DWD or Division of Hearings and Appeals

§ 102.26(1)
Rice Lake Creamery Co
v Indus Comm'n
17 Wis. 2d 177, 180–81
(1962)

C. Prevailing party shall not recover costs unless Ct expressly so orders

No costs may be taxed against LIRC

6. Remittitur

§ 102.25(1)

A. Judgment of Ct becomes final if no appeal is taken therefrom within time period specified in § 808.04(1)

§ 102.23(3)

B. If no appeal, record should be returned to LIRC within five days after expiration of time for appeal

CV 32: UNEMPLOYMENT INSURANCE

1. Judicial Review

A. Ch

108 governs Circuit Ct review of LIRC decisions

§ 108.09(7)(c)1.

B. The order of LIRC is subject to review only as provided in § 108.09(7)(c)1. and not under Ch 227 or § 801.02

§ 108.09(7)(b)

C. Any judicial review under Ch 108 shall be confined to questions of law and shall be in accordance with § 108.09(7)

§ 108.09(7)(c)1.

D. The findings of fact made by LIRC acting within its powers shall, in the absence of fraud, be conclusive

2. Commencement of Circuit Court Review

§ 108.09(7)(a)

A. Parties to the Judicial Review

1) Any party that is not the Department of Workforce Development (DWD) may commence an action for the judicial review of a decision of LIRC under Ch 108 after exhausting the remedies provided under § 108.09

2) DWD may commence an action for the judicial review of a LIRC decision under § 108.09(7)

   a. DWD is not required to have been a party to the proceedings before LIRC

   b. DWD is not required to have exhausted the remedies provided under § 108.09

3) When the action is commenced by a party that is not DWD, DWD shall be a Def and shall be named as a party in the complaint

§ 108.09(7)(c)1.

4) Every other party to the proceedings before LIRC shall be made a Def in an action for judicial review of the LIRC order

§ 108.09(7)(a)

5) If a plaintiff fails to name either DWD or LIRC as Defs and serve LIRC as required by § 108.09(7)(a), the Ct shall dismiss the action

B. Summons and complaint

§ 108.09(7)(c)

1) Action commenced by serving and filing summons and complaint on LIRC, within 30 days after the date of LIRC's order

a. If the Circuit Ct is satisfied that a party in interest has been prejudiced because of an exceptional delay in the receipt of a copy of any order, the Circuit Ct may extend the time in which an action may be commenced by an additional 30 days

§ 108.09(7)(c)3.

b. Complaint must be served with an authenticated copy of summons

c. The complaint need not be verified

d. The complaint must state the grounds upon which a review is sought

Schiller v DILHR
103 Wis. 2d 353, 356–57
(1981)

e. Sec. 801.15(5) does not extend appeal period by 3 days when service is made by mail

Cruz v DILHR
81 Wis. 2d 442, 449
(1978)
Rathjen v Indus Comm'n
233 Wis. 452, 458 (1940)
Milw W Fuel Co
v Indus Comm'n
172 Wis. 561, 563 (1920)

2) Time limit and joinder requirements are jurisdictional and strict compliance required

§ 108.09(7)(c)3.

3) Service upon LIRC or an agent authorized by LIRC to accept service constitutes complete service on all parties

a. As many copies of the summons and complaint as there are Defs must be left with the person (LIRC or the authorized agent) accepting service

b. LIRC shall mail one copy to each other Def

C. Venue

§ 108.09(7)(c)

1) Venue is generally in Ct of Cty where plaintiff resides, BUT:

2) If Plaintiff is the DWD, the proceedings must be in the Circuit Ct of the Cty where a Def other than LIRC resides

3) Action may be brought in any Cty if the parties stipulate or if Ct, after notice and hearing, so orders

§ 108.09(7)(c)2.

4) Commencing an action in a Cty in which no Def resides does not deprive the Ct of competency to proceed to judgment on the merits of the case

D. Standing

Cornwell Pers Assocs v DILHR
92 Wis. 2d 53, 62–63
(Ct. App. 1979)

1) Employer whose unemployment insurance account is not affected by LIRC's decision has no standing to seek judicial review

§ 108.09(7)(a)

2) DWD may seek review of a LIRC decision

E. Responsive pleadings

§ 108.09(7)(c)4.
Rathjen v Indus Comm'n
233 Wis. 452, 456–57
(1940)

1) Each Def must serve answer within 20 days after service of summons and complaint on LIRC

a. The answer may, by way of counterclaim or cross-complaint, ask for the review of the order referred to in the complaint, with the same effect as if the Def had commenced a separate action for the review of the order

b. LIRC may move to dismiss

3. Pretrial Practice

A. Motions to dismiss are handled according to normal motion practice before consideration of case on merits

§ 108.09(7)(c)5.

B. Within 60 days after appearing in the action, LIRC must make return to Ct of the record before LIRC, including transcript of hearing testimony

C. Case is decided on basis of agency record

§ 108.09(7)(c)5.

D. After LIRC makes return of the judgment roll to the Ct, the Ct shall schedule briefing by the parties

1) Neither scheduling nor pretrial conference is required

2) Any party may request oral argument

Committee Comment

Statute says, "may request"; it does not say the Ct has to grant the request

4. Hearing Practice and Procedure

§ 108.09(7)(c)5.

A. Review based on agency record

Liberty Trucking Co v DILHR
57 Wis. 2d 331, 342
(1973)

1) Ct acts in appellate capacity on record made before agency

2) General rule

Weibel v Clark
87 Wis. 2d 696, 708
(1979)
St ex rel Madison Airport Co v Wrabetz
231 Wis. 147, 155 (1939)

Evidence not taken in Ct on review, unless fraud alleged on part of LIRC in arriving at decision

§ 108.101(4)
Goetsch v DWD
2002 WI App 128
254 Wis. 2d 807

3) Judicial or administrative findings in other actions concerning the rights of a party are not binding in any action under Ch 108

4) Case reviewed by Ct on record, briefs, and oral argument if requested by parties or desired by Ct

a. Oral argument waived, unless requested

b. When scheduled, oral arguments generally pursuant to Ct's own notice of date

Brandt v LIRC
160 Wis. 2d 353, 361
(Ct. App. 1991), *aff'd*,
166 Wis. 2d 623 (1992)

c. It is permissible to cite Circuit Ct opinions in briefs

B. Scope of review

§ 108.09(7)(c)1.
Boynton Cab Co v Giese
237 Wis. 237, 249 (1941)
Princess House, Inc
v DILHR
111 Wis. 2d 46, 53
(1983),
superseded by statute on
other grounds by 1983
Wis Act 8, §7 (creating
§ 108.02(15)(k)16.), *as*
recognized in Nat'l Safety
Assocs v LIRC
199 Wis. 2d 106
(Ct. App. 1995)
Abbyland Processing
v LIRC
206 Wis. 2d 309
(Ct. App. 1996)

1) Findings of fact made by LIRC conclusive on review in absence of fraud, if supported by credible and substantial evidence

§ 108.09(7)(c)6.

2) The Ct may confirm or set aside LIRC's order, but may set aside the order only upon one or more of the following grounds:

a. That LIRC acted without or in excess of its powers

b. That the order was procured by fraud

c. That the findings of fact by LIRC do not support the order

§ 108.09(7)(dm)

3) The Ct shall disregard any irregularity or error of LIRC or DWD unless it is made to affirmatively appear that a party was damaged by that irregularity or error

§ 108.09(7)(f)

4) If LIRC's order depends on any fact found by LIRC, the Ct shall not substitute its judgment for that of LIRC as to the weight or credibility of the evidence on any finding of fact

Bucyrus-Erie Co
v DILHR
90 Wis. 2d 408, 418
(1979)
Princess House, Inc
v DILHR
111 Wis. 2d 46, 53 (1983)

5) The Ct may, however, set aside LIRC's order and remand the case to LIRC if LIRC's order depends on any material and controverted finding of fact that is not supported by credible and substantial evidence

a. Credible and substantial evidence is such relevant evidence as reasonable mind might accept as adequate to support a conclusion

RT Madden, Inc
v DILHR
43 Wis. 2d 528, 547
(1969)

b. Assumption in test is that evidence is

- Relevant
- Evidentiary and not conclusion of law
- Not so completely discredited by other evidence that Ct could find it incredible as matter of law

Princess House, Inc
v DILHR
111 Wis. 2d 46, 53 (1983)

c. Findings may be sufficient even though not based upon a preponderance of evidence

Wright v LIRC
210 Wis. 2d 289
(Ct. App. 1997)

6) LIRC acts in excess of its powers and offends due process when it modifies ALJ's findings of fact to determine an issue not noticed for hearing and not fully litigated by the parties

St v Indus Comm'n
233 Wis. 461, 465 (1940)

7) Review is of LIRC's decision and not of appeal tribunal's (hearing examiner's)

City of Appleton
v DILHR
67 Wis. 2d 162, 168–72
(1975)
Transamerica Ins Co
v DILHR
54 Wis. 2d 272, 284–85
(1972)

a. If LIRC adopts and affirms findings and conclusions of appeal tribunal, it makes those findings and conclusions its own

Hakes v LIRC
187 Wis. 2d 582, 589
(Ct. App. 1994)

b. Initial credibility determinations by the Appeal Tribunal (ALJ) subject to independent review by LIRC

Transamerica Ins Co
v DILHR
54 Wis. 2d 272, 284–85
(1972)

c. Reversal of ALJ's initial credibility determination requires LIRC to consult with hearing examiner on issue of witness credibility and LIRC must issue memorandum explaining disagreement, if any

Lisney v LIRC
171 Wis. 2d 499, 505
(1992)
Local 695 v LIRC
154 Wis. 2d 75, 82 (1990)

8) Ct will give no deference to LIRC legal interpretation when

a. Interpretation contravenes statutory language, is contrary to legislative intent, or is otherwise unreasonable or without rational basis

Doering v LIRC
187 Wis. 2d 472, 477
(1994)

b. Interpretation conflicts with prior Wis Supreme Ct case law

Schenkoski v LIRC
203 Wis. 2d 109
(Ct. App. 1996)

c. Interpretation concerns LIRC's statutory authority

Tetra Tech EC, Inc
v Dep't of Revenue
2018 WI 75, ¶ 11 n8
382 Wis. 2d 496
See also § 227.57(11)

9) In *Tetra Tech EC, Inc v Dep't of Revenue*, 2018 WI 75 382 Wis. 2d 496, a majority of the Wis Supreme Ct ended the long-held practice of Cts deferring to administrative agencies' interpretation of statutes and regulations under certain conditions. See Note discussing the case in **CV 30 Sec. 11.G.** Footnote 8 of the lead opinion states that "[t]his decision applies to judicial review of all administrative agency decisions"

108.09(7)(dm)
Weibel v Clark
87 Wis. 2d 696, 704
(1979)
Amsoil, Inc v LIRC
173 Wis. 2d 154, 167
(Ct. App. 1992)

10) Ct must disregard harmless error by agency

Universal Foundry Co
v DILHR
86 Wis. 2d 582, 587, 590
(1979)

11) Usual practice is for Ct to issue memorandum opinion stating reasons for its decision

McGraw-Edison Co
v DILHR
64 Wis. 2d 703, 710
(1974)

12) Ct has no authority to make own findings of fact

§ 108.09(7)(c)6.

13) Permitted dispositions

a. Confirm LIRC decision

b. Set aside LIRC decision

Consolidated Constr Co
v Casey

71 Wis. 2d 811, 819
(1976)

c. Remand to LIRC for additional findings

5. Judgment and Remittitur

A. Judgment

Bearns v DILHR
102 Wis. 2d 70, 76–77
(1981)

1) Confirmation or setting aside of LIRC decision

Practice is for Ct to prepare and enter judgment or direct prevailing party to do so in Ct's memorandum opinion

§ 108.09(7)(f), (g)

2) If Ct sets aside LIRC decision, it may either

a. Remand record for further proceedings, or

b. Enter judgment upon LIRC's findings

§ 108.09(7)(i)
Rice Lake Creamery Co v Indus Comm'n
17 Wis. 2d 177, 180–81
(1962)

3) Costs as between parties in discretion of Ct

a. Prevailing party shall not recover costs, unless directed by Ct

b. No costs may be taxed against LIRC or DWD

B. Remittitur

§ 108.09(7)(g)
Kohnke v DILHR
52 Wis. 2d 687, 689
(1971)

§ 108.09(7)(e)

1) Judgment of Ct becomes final if no appeal is taken from judgment within time period specified in § 808.04(1)

2) If no appeal, record must be returned to LIRC within 5 days after expiration of time for appeal

CV 33: ZONING

1. Zoning

A. Definition

Heitman v City of Mauston Common Council
226 Wis. 2d 542
(Ct. App. 1999)

Zoning has been described as the division of a jurisdiction's land into districts (zones) and the establishment of regulations in those zones to control both the use of property and the size and location of structures on properties

2. Zoning Authority

A. Constitutional bases

Town of Rhine v Bizzell
2008 WI 76
311 Wis. 2d 1
Kmiec v Town of Spider Lake
60 Wis. 2d 640 (1973)
Wilke v City of Appleton
197 Wis. 2d 717
(Ct. App. 1995)

1) Municipalities are delegated police power to enact zoning ordinances in the interest of public health, morals, safety, and public welfare. The concept of public welfare is "broad and inclusive," but zoning regulations and ordinances must be reasonable and bear a rational relationship to the purpose or object of the regulation

2) Municipal zoning authority circumscribed by enabling statutes

Northwest Prop v Outagamie Cty
223 Wis. 2d 483, 488
(Ct. App. 1998)

a. Municipal zoning ordinance that exceeds its authority or fails to comply with state legislation is invalid

DeRosso Landfill Co v City of Oak Creek
200 Wis. 2d 642, 650–51
(1996)

b. Municipal zoning ordinances must be consistent with state legislation

§ 895.463
Missionaries of Our Lady of La Salette v Vill of Whitefish Bay
267 Wis. 609, 614 (1954)
HEEF Realty & Invs v City of Cedarburg Bd of Appeals
2015 WI App 23, ¶ 7
361 Wis. 2d 185

3) Zoning ordinance restrictions on free use of property are strictly construed; restrictions on free use must be clear and unambiguous; Cts resolve an ambiguity in the meaning of a word or phrase in a zoning ordinance in favor of free use of property

Town of Rhine v Bizzell
2008 WI 76
311 Wis. 2d 1
Northwest Prop v
Outagamie Cty
223 Wis. 2d 483, 487
(Ct. App. 1998)

4) Doubts as to the constitutionality of a zoning ordinance must be construed in favor of sustaining the ordinance as valid

Person challenging zoning ordinance must prove unconstitutionality beyond a reasonable doubt

B. Statutory authority

§ 62.23

1) Cities

a. City Council may regulate and redistrict by ordinance the location and use of buildings and lands

b. Regulations must be uniform for each class or kind of building and for the use of land throughout each district

c. Regulations must be made in accordance with a comprehensive plan

§ 66.1002
Wis Realtors Ass'n v
Town of West Point
2008 WI App 40, ¶ 8
309 Wis. 2d 199

d. Qualifying municipality has authority to temporarily prohibit land division while it develops comprehensive plan under smart growth law, § 66.1001

§ 61.35

2) Villages

Powers and duties of § 62.23 apply to Village officials who perform the respective zoning duties

§ 59.69

3) Counties

a. Cty Bd can adopt a zoning ordinance to establish districts and regulations for such districts

b. Ordinance applies in Towns that approve it

§ 59.69(5m)
§ 60.23(34)

c. Certain Towns may withdraw from Cty zoning

§ 59.69(4)

d. Cty cannot enact a development moratorium restricting land division or rezoning

4) Towns

§ 60.61

a. Town may exercise limited zoning authority if located in a Cty that has not adopted a Cty zoning ordinance under § 59.69

§ 60.23(34)

b. Town that withdraws from Cty zoning may adopt ordinance essentially identical to Cty's or may adopt model ordinance, and may exercise limited zoning authority

§ 60.62(3)

c. If Town is in Cty that has a zoning ordinance and a population less than 485,000, all ordinances and amendments are subject to approval by Cty Bd

§ 60.62(1)

d. If Town Bd exercises Village powers under § 60.10(2)(c), Bd may adopt general zoning ordinances under § 61.35

§ 60.61(3r)
§ 60.62(5)

e. Town may adopt general zoning ordinance that applies in both shoreland and non-shoreland areas, although it may not impose restrictions or requirements in shorelands with respect to matters regulated by a Cty shoreland zoning ordinance

St ex rel Anderson v Town of Newbold
2021 WI 6
395 Wis. 2d 351

f. Town may impose minimum lot standards under subdivision ordinance, although such regulation would be prohibited as an exercise of zoning power

§ 66.1002
Wisconsin Realtors Ass'n v Town of West Point
2008 WI App 40, ¶ 8
309 Wis. 2d 199

5) Qualifying municipality has authority to temporarily prohibit land division while it develops comprehensive plan under smart growth law, § 66.1001

§ 59.69(4)

6) Cty cannot enact a development moratorium restricting land division or rezoning

C. Decision-making procedure

§ 62.23(1), (7)(d)
§ 59.69(2)

1) City Council/Cty Bd appoints plan commission/Cty zoning agency to advise on zoning code and adopt master plan for development

§ 62.23(3)
§ 66.1001(3)
Bell v City of Elkhorn
122 Wis. 2d 558, 567
(1985)

In some cases, zoning ordinance adopted before January 1, 2010, can itself constitute the "comprehensive plan" required by §§ 62.23(7)(c) and 61.35

§ 62.23(7)
§ 59.69(5)

2) Group of ordinances enacted by Council/Bd to regulate uses of land within municipality form the zoning code

§ 62.23(6)(e)
§ 66.0425

3) A permit to construct within public spaces is issued in accordance with § 62.23(6)(e); a privilege to place obstruction or excavation beyond a lot line, or within a highway is issued in accordance with § 66.0425

§ 62.23(7)(e)

4) Right of appeal to Zoning Bd of Appeals

3. Zoning Codes

A. Types of uses and zoning

Town of Rhine v Bizzell
2008 WI 76, ¶ 19
311 Wis. 2d 1

1) Generally, zoning is a permissive form of regulation, i.e., owner may use property as permitted within zoning code

Town of Rhine v Bizzell
2008 WI 76, ¶ 19
311 Wis. 2d 1

2) Permitted use is one that is expressly permitted in zoning code

AllEnergy Corp v
Trempealeau Cty Envt &
Land Use Comm
2017 WI 52, ¶ 55
375 Wis. 2d 329
Edward Kraemer & Sons
v Sauk Cty
Bd of Adjstmnt
183 Wis. 2d 1, 16–17
(1994)

3) Conditional use is one that may be permitted when certain conditions have been met

§ 59.69(5e)(a)1.
§ 60.61(4e)(a)1.
§ 60.62(4e)(a)1.
§ 62.23(7)(de)1.a.

a. Conditional use means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a Cty, City, Village, or Town, but does not include a variance

§ 66.1001(2m)(b)

b. Conditional use permits need not be consistent with comprehensive plans

Town of Rhine v Bizzell
2008 WI 76, ¶ 23
311 Wis. 2d 1

c. One purpose of allowing conditional uses is to provide flexibility regulating certain land uses that may create special problems if allowed to locate as a matter of right in a particular zone

Hussein v Vill of Germantown Bd of Zoning Appeals
2011 WI App 96, ¶ 13
334 Wis. 2d 764

d. If ordinance change disallows conditional use in a district, permit conditions can no longer be enforced and the use becomes nonconforming, subject to restrictions on nonconforming uses

Crowley v Knapp
94 Wis. 2d 421, 440
(1980)

4) Prohibited use is use not expressly allowed as permitted or conditional use for a particular area

§ 59.69(10)
§ 62.23(7)(h)

B. Lawful nonconforming uses

Waukesha Cty v Seitz
140 Wis. 2d 111, 114–15
(Ct. App. 1987)
See also § 59.69(10)(ab)

1) Lawful nonconforming use is use that existed lawfully before enactment of zoning ordinance or amendment, and that is maintained after effective date of ordinance or amendment, although not permitted by current zoning restrictions

See Vill of Euclid v Ambler Realty Co
47 S. Ct. 114, 118 (1926)
Des Jardin v Town of Greenfield
262 Wis. 43, 49 (1952)

a. Right to continue a lawful nonconforming use is required by constitutional principles that prohibit the taking of private property without just compensation

Cty of Walworth v Hartwell
62 Wis. 2d 57, 61 (1974)

b. Burden on property owner to prove nonconforming use has continued in actual and active manner to create vested interest

§ 62.23(7)(h)
Vill of Slinger v Polk Props, LLC
2021 WI 29
396 Wis. 2d 342

c. Abandonment of legal nonconforming use requires (1) actual cessation of use, not just mere suspension; and (2) intent to abandon the nonconforming use

Town of Cross Plains v Kitt's "Field of Dreams" Korner, Inc

2009 WI App 142
321 Wis. 2d 671

d. There is no vested right to continue a nonconforming use if the owner did not make a substantial investment, while reasonably relying on the ordinance in effect, or if the potential loss from discontinuing the use is not substantial

Waukesha Cty v
Pewaukee Marina, Inc
187 Wis. 2d 18, 31
(Ct. App. 1994)

2) Change or expansion of an existing lawful nonconforming use may invalidate the lawful nonconforming use and require compliance with current zoning code

Waukesha Cty v
Pewaukee Marina, Inc
187 Wis. 2d 18, 26
(Ct. App. 1994)

a. However, mere increase in volume, intensity, or frequency of nonconforming use—which is not an identifiable change in use—not sufficient to invalidate the lawful nonconforming use

Waukesha Cty v
Pewaukee Marina, Inc
187 Wis. 2d 18, 29
(Ct. App. 1994)

b. Burden of proof, as to whether expansion of nonconforming use constitutes change of use so as to invalidate existing use, is on property owner

Marris v
City of Cedarburg
176 Wis. 2d 14, 33–34
(1993)

c. Statutes or ordinances limiting extent to which nonconforming structure can be repaired or rebuilt are intended to balance competing policies of protecting property owner's rights to improve and modernize a nonconforming structure and community's interest in speedy elimination of nonconforming uses

§ 59.69(10)(at)

d. Licensed manufactured home community does not lose legal nonconforming use status when a home or infrastructure is repaired or replaced

C. Lawful nonconforming structures

1) Lawful nonconforming structure is a structure that existed lawfully before enactment of zoning ordinance or amendment, but that now violates the size, location, or dimensional limits of its zoning ordinance

Marris v
City of Cedarburg
176 Wis. 2d 14, 33–34
(1993)
St ex rel Home Ins Co
v Burt
23 Wis. 2d 231,
236–42 (1964)
St ex rel Covenant
Harbor Bible Camp
v Steinke

7 Wis. 2d 275, 280–84 (1959)
Des Jardin v Greenfield
262 Wis. 43, 49 (1952)

a. Statutes or ordinances that limit repairs or improvements to nonconforming structures must be interpreted consistently with constitutional principles that prohibit takings without just compensation so as to not be rendered invalid

§ 62.23(7)(hb) & (hc)

b. City or Village ordinance cannot prohibit or limit repair of nonconforming structure, and damaged or destroyed structure may be replaced under certain circumstances

§ 59.69(10e)(b)
§ 60.61(5e)(b)

c. Cty or Town ordinance cannot prohibit or limit, based on cost, or require a variance, for the repair or rebuilding of a nonconforming structure, or any part thereof

§ 59.69(10m)(a)
§ 60.61(5m)(a)

d. Cty or Town ordinance cannot prohibit the restoration of damaged or destroyed nonconforming structures, or impose limits on the cost of repairs, if damaged or destroyed nonconforming structure meets certain conditions

D. Amendment of zoning ordinance

§ 62.23(7)(d)2.
§ 59.69(5)(e)

1) Procedure

a. City hearing must be held based on recommendation of plan commission. In Cty, landowner, Town Bd, or Cty zoning agency may petition for amendment

§ 59.69(5)(e)2.
§ 62.23(7)(d)1.
§ 985.07

b. Notice of hearing must be made public by class 2 notice for each of the two weeks before the hearing

§ 59.69(5)(e)3.
Johnson v Washburn Cty
2010 WI App 50
324 Wis. 2d 366

c. If affected Town properly disapproves a proposed amendment, Cty zoning agency cannot recommend approval of petition without first changing it

§ 66.10015(3)(b), *as renumbered by* 2023 Wis. Act 16 (eff 1/1/2025)

d. "Down zoning" ordinance amendment decreasing density or reducing permitted uses requires approval by 2/3 majority unless requested or agreed to by landowner

§ 66.10015(3)(a), *as created by* 2023 Wis. Act 16 (eff 1/1/2025)

e. Zoning ordinance amendment shall be approved by a simple majority of a quorum of members-elect, except in the case of a petition to rezone an airport affected area as to which a valid protest petition has been filed

2) Spot zoning

Howard v
Vill of Elm Grove
80 Wis. 2d 33, 41–42
(1977)
Cushman v
City of Racine
39 Wis. 2d 303, 306–07
(1968)

a. Zoning map amended so that a single lot is zoned differently than land in the vicinity and the "same use district"

Step Now Citizens Grp v
Town of Utica Planning
& Zoning Comm
2003 WI App 109, ¶ 30
264 Wis. 2d 662

b. Should only occur when consistent with long-range planning and considerations that affect the community. Nature and character of parcel, use of surrounding land, and zoning scheme are relevant; public health, morals, safety, promotion of public welfare, convenience, and general prosperity must be considered

Bubolz v Dane Cty
159 Wis. 2d 284, 297
(Ct. App. 1990)

c. Judicial review limited to erroneous exercise of discretion, excess of power, or error of law

3) Consistency with comprehensive plan

§ 66.1001(3)
Lakeland Area Prop
Owners Ass'n v
Oneida Cty
2021 WI App 19
396 Wis. 2d 622

a. Zoning ordinance amendment must be consistent with comprehensive plan

§ 66.1001(1)(am)

b. "Consistent with" means "furthers or does not contradict the objectives, goals, and policies contained in the comprehensive plan"

E. Remedies

1) Injunctions

Forest Cty v Goode
219 Wis. 2d 654 (1998)

If a zoning violation is proved, municipality need not prove irreparable harm or absence of adequate remedy at law. There is a rebuttable presumption that Ct should grant injunction. To overcome presumption, Def must convince Ct that there are compelling equitable reasons to deny injunctive relief

2) Estoppel

Vill of Hobart v Brown Cty
2005 WI 78, ¶ 30
281 Wis. 2d 628
City of Milwaukee v Leavitt
31 Wis. 2d 72, 76–77
(1966)

a. Estoppel will not lie against a municipality seeking to enforce ordinance enacted pursuant to police power

Willow Creek Ranch, LLC v Town of Shelby
2000 WI 56, ¶ 49
235 Wis. 2d 409

b. Cty or municipality may enforce ordinance despite erroneous acts or representations to landowner by employee

3) Mandamus

Beres v City of New Berlin
34 Wis. 2d 229 (1967)
Hartland Sportsmen's Club, Inc v City of Delafield
2020 WI App 44
393 Wis. 2d 496

Individual with standing who has exhausted all administrative remedies can file for mandamus to seek to compel administrative action, such as granting a permit, when appropriate

4. Zoning Bd Decision Making

A. Zoning Bd of Appeals/Adjustment: Powers and Procedures

§ 62.23(7)
§ 59.694(7)
§ 60.65

1) Bd is authorized to grant variances and to hear appeals when it is alleged that an administrative official has issued an erroneous decision or determination, and it may be authorized by ordinance to issue special exception/ conditional use permits

Town of Hudson v Hudson Town Bd of Adjstmnt
158 Wis. 2d 263
(Ct. App. 1990)

2) Power to grant special exceptions may be given to Village or Town Bd, in which case appeal may be taken to Circuit Ct

Magnolia Twnship v Town of Magnolia
2005 WI App 119, ¶ 33
284 Wis. 2d 361

3) If the Town Bd is authorized to grant or deny a conditional use permit, its decision cannot be appealed to the Town Bd of Adjustment

4) Procedures

Marris v City of Cedarburg
176 Wis. 2d 14, 24 (1993)

a. Bd must conduct fair and impartial hearing

St v Kenosha Cty Bd of Adjustment
218 Wis. 2d 396, 416 (1998)

b. Bd decisions must be based on evidence

Osterhues v Bd of Adjstmnt for Washburn Cty
2005 WI 92, ¶ 33
282 Wis. 2d 228

c. Bd may take new testimony and evidence to supplement the record

Roberts v Manitowoc Cty Bd of Adjstmnt
2006 WI App 169, ¶¶ 22–26, 295 Wis. 2d 522

d. Bd's hearing procedure applying 5-minute limit to most individual presentations, while allowing more time to one presenter, was not unreasonable

§ 62.23(7)(e)
§ 59.694(7)

B. Special Exceptions/Conditional Uses

St ex rel Skelly Oil Co v Common Council
58 Wis. 2d 695 (1973)

1) Bd may make special exception to zoning ordinances as long as exception complies with general purpose and intent of zoning ordinance and applicable rules

Rainbow Springs Golf Co v Town of Mukwonago
2005 WI App 163, ¶ 18
284 Wis. 2d 519

2) A special exception permit/conditional use permit is not a property right

§ 59.69(5e)(b)1.
§ 60.61(4e)(b)1.
§ 60.62(4e)(b)1.
§ 62.23(7)(de)2.a.

3) If an applicant for a conditional use permit meets or agrees to meet all of the requirements and conditions in the ordinance or those imposed by the Zoning Bd, the conditional use permit must be granted

§ 59.69(5e)(b)1.
§ 60.61(4e)(b)1.
§ 60.62(4e)(b)1.
§ 62.23(7)(de)2.a.

a. Conditions must be related to the purpose of the ordinance and be based on "substantial evidence"

§ 59.69(5e)(b)2.
§ 60.61(4e)(b)2.
§ 60.62(4e)(b)2.
§ 62.23(7)(de)2.b.

b. Conditions must be reasonable and, to the extent practicable, measurable, and may include conditions such as the permit's duration, transfer, or renewal

§ 59.69(5e)(b)2.
§ 60.61(4e)(b)2.
§ 60.62(4e)(b)2.
§ 62.23(7)(de)2.b.
St ex rel Earney v Buffalo Cty Bd of Adjstmnt
2016 WI App 66, ¶ 12
371 Wis. 2d 505
Delta Biological Res, Inc v Bd of Zoning App of Milwaukee
160 Wis. 2d 905, 913
(Ct. App. 1991)

4) Burden is on the party seeking conditional use permit to establish, based on "substantial evidence," its application satisfies or will satisfy conditions in the ordinance or those imposed by the Zoning Bd

§ 59.69(5e)(b)1.
§ 60.61(4e)(b)1.
§ 60.62(4e)(b)1.
§ 62.23(7)(de)2.a

5) The decision to approve or deny the conditional use permit must be supported by "substantial evidence"

§ 59.69(5e)(d)
§ 60.61(4e)(d)
§ 60.62(4e)(d)
§ 62.23(7)(de)4.

6) Conditional use permits remain in effect as long as the conditions upon which the permit was issued are followed, or in accordance with the conditions on the permit's duration, transfer, or renewal

St ex rel Skelly Oil Co v Common Council
58 Wis. 2d 695, 700
(1973)

7) "Special exceptions" and "conditional uses" are treated the same by Cts

Fabyan v Waukesha Cty Bd of Adjstmnt
2001 WI App 162,
¶¶ 13–18,
246 Wis. 2d 851

8) See *Fabyan* case for discussion of difference between special exceptions and variances

C. Variances

Roberts v Manitowoc Cty Bd of Adjustment
2006 WI App 169,
¶¶ 18–19
295 Wis. 2d 522

1) Whether a provision is a conditional use or variance is determined by its context in the ordinance either to permit a use subject to conditions, or to authorize a use that is prohibited

§ 59.694(7)(c)1.
§ 62.23(7)(e)7.a.
St ex rel Ziervogel v Washington Cty Bd of Adjstmnt
2004 WI 23, ¶¶ 4, 21
269 Wis. 2d 549
St v Outagamie Cty Bd of Adjstmnt
2001 WI 78, ¶ 34
244 Wis. 2d 613

2) Two distinct types of variances

a. Use variance—allows property to be used in a way prohibited by a zoning ordinance

b. Area variance—allows an exception, or modification, to a dimensional, physical, or locational restriction such as a bulk, density, height, frontage, or setback restriction for a permitted use

§ 59.694(7)(c)
§ 62.23(7)(e)7.d.
St v Waushara Cty Bd of Adjstmnt
2004 WI 56, ¶ 33
271 Wis. 2d 547
St ex rel Ziervogel v Washington Cty Bd of Adjstmnt
2004 WI 23, ¶¶ 7, 18–20, 33, 42,
269 Wis. 2d 549

3) Only if the following four conditions are met may property owners obtain variance relieving them of obligation to comply with zoning requirement:

a. Property owner bears the burden of proving that enforcing the zoning requirement will result in "unnecessary hardship,"

b. Hardship is based on physical limitation (such as, for example, a steep slope or wetlands) "unique to the property" and not shared by other area properties,

§ 59.694(7)(c)3.
§ 62.23(7)(e)7.d.
Snyder v Waukesha Cty Zoning Bd of Adjstmnt
74 Wis. 2d 468 (1976)

c. Hardship "is not self-created," and

d. Variance is not "contrary to the public interest"

§ 59.694(7)(c)3.
§ 62.23(7)(e)7.d.
St ex rel Ziervogel

v Washington Cty
Bd of Adjstmnt
2004 WI 23, ¶¶ 6, 8, 31
269 Wis. 2d 549

4) To show "unnecessary hardship" required for *use* variance, property owner must show that strict compliance with a zoning ordinance would leave property owner with "no reasonable use" without variance

§ 59.694(7)(c)3.
§ 62.23(7)(e)7.d.
St v Waushara Cty
Bd of Adjstmnt
2004 WI 56, ¶¶ 26, 32, 35
271 Wis. 2d 547
St ex rel Ziervogel
v Washington Cty
Bd of Adjstmnt
2004 WI 23, ¶¶ 7,
31, 33, 41, 42
269 Wis. 2d 549
Snyder v Waukesha Cty
Bd of Adjstmnt
74 Wis. 2d 468, 474–75
(1976)

5) To show "unnecessary hardship" required for *area* variance, property owner must show that strict compliance with a zoning ordinance "would unreasonably prevent the owner from using the property for a permitted purpose" or would be "unnecessarily burdensome"

a. In determining whether showing is made, Bd must consider:

- Purpose of zoning restriction in question
- Effect of zoning restriction on property, and
- Effect variance would have on neighborhood and overall public interest

Driehaus v Walworth Cty
2009 WI App 63
317 Wis. 2d 734

b. Bd may consider proposed use of a structure when it conducts its analysis

Accent Developers, LLC
v City of Menomonie
Bd of Zoning Appeals
2007 WI App 48
300 Wis. 2d 561

6) Bd may consider role of its officials in zoning violation in determining whether hardship was self-created

Snyder v Waukesha
Cty Zoning Bd of
Adjstmnt
74 Wis. 2d 468, 478–79
(1976)

7) Owner is not entitled to a variance simply to increase the value of the property

St ex rel Ziervogel
v Washington Cty
Bd of Adjstmnt
2004 WI 23, ¶¶ 7, 20, 33,
269 Wis. 2d 549

8) Property owner has burden of proving "unnecessary hardship"

5. Judicial Review of Zoning Decisions

A. Certiorari

Smart v Dane Cty
Bd of Adjstmnt
177 Wis. 2d 445, 456
(1993)
Jefferson Cty v Timmel
261 Wis. 39, 63–64
(1952)

1) Party must exhaust administrative appeals before resorting to Cts

Bettendorf v St Croix
Cty Bd of Adjstmnt
188 Wis. 2d 311
(Ct. App. 1994)

a. Request for review must be made within 30 days after filing of decision

Acevedo v
City of Kenosha
2011 WI App 10, ¶ 17
331 Wis. 2d 218

b. Request must name Bd or body whose decision is sought to be reviewed

Bettendorf v St Croix
Cty Bd of Adjstmnt
188 Wis. 2d 311
(Ct. App. 1994)

c. Request to reconsider Bd's decision, raising no new issues, does not extend appeal time

§ 59.694(10)
§ 62.23(7)(e)10.

2) Jurisdiction conferred by statute for certiorari review

For full discussion of certiorari see **Certiorari**, CV 26, this volume

Barber v Weber
2006 WI App 88, ¶ 13
292 Wis. 2d 426

3) Failure to seek judicial review of Zoning Bd decision may result in claim preclusion in subsequent action

Miller v Zoning Bd of
Appeals of Vill of
Lyndon Station
2022 WI App 51
404 Wis. 2d 539
aff'd on other grounds

2023 WI 46
407 Wis. 2d 678

4) Certiorari is the appropriate method of review of local zoning decisions whether legislative or judicial in nature

5) If the certiorari action arises from a denial of a residential development application for approval, then special procedures apply under § 781.10

B. Standing

§ 59.69(11)
Carlin Lake Ass'n v Carlin Club Props, LLC
2019 WI App 24
387 Wis. 2d 640

1) Compliance with Cty zoning ordinance may be enforced by injunctional order at the suit of the Cty or an owner of real estate within the district affected by the regulation

§ 62.23(7)(f)2.
Holzbauer v Ritter
184 Wis. 35 (1924)

2) Acts in violation of municipal zoning ordinance may be restrained, corrected, or abated by the proper authorities of the city or by neighboring property owner who would be specially damaged by such violation

§ 60.61(6)

3) Town zoning ordinance may be enforced by the town or the owner of real estate within a district affected by the ordinance

§ 781.10(2)(c)
as created by 2023 Wis. Act 16

4) Standing to appeal zoning permit or approval for residential development limited to applicant, property owner, local governmental unit, or party that (a) has sustained or will imminently sustain actual damages, and (b) submitted an objection to the zoning authority

C. Scope of review

1) Whether Bd acted within its jurisdiction and authority

Old Tuckaway Assocs v City of Greenfield
180 Wis. 2d 254
(Ct. App. 1993)

2) Whether Bd proceeded on correct theory of law

Edward Kraemer & Sons v Sauk Cty Bd of Adjstmnt
183 Wis. 2d 1 (1994)

a. Bd proceeds on correct theory of law when it relies on applicable ordinances and cases and applies them properly

Hansman v Oneida Cty
123 Wis. 2d 511, 514

(Ct. App. 1985)

- Ct need not accept Bd's interpretation of the ordinance

Roberts v Manitowoc Bd of Adjustment
2006 WI App 169, ¶ 16
295 Wis. 2d 522

- Bds are entitled to a degree of deference in the interpretation and application of ordinance, and it is petitioner's duty to convince the Ct that Bd's interpretation is incorrect

§ 895.463

- Ct must resolve any ambiguity in the meaning of an ordinance term or phrase in favor of the free use of private property

St v Winnebago Cty
196 Wis. 2d 836
(Ct. App. 1995)

b. Ct decides questions of law de novo

St v Waushara Cty Bd of Adjstmnt
2004 WI 56, ¶ 2
271 Wis. 2d 547
St ex rel Ziervogel v Washington Cty Bd of Adjstmnt
2004 WI 23, ¶ 13
269 Wis. 2d 549

c. Reviewing Ct must accord presumption of validity and correctness to Bd decision

Marris v City of Cedarburg
176 Wis. 2d 14 (1993),
cited in Miller v Zoning Bd of Appeals of Vill of Lyndon Station
2023 WI 46
407 Wis. 2d 678

d. Due process requires impartial decision-maker in quasi-judicial zoning decisions; however, no such due-process right exists when decision-maker is taking official action with respect to proposal for zoning ordinance amendment, which is discretionary legislative determination

3) Whether Bd's action was arbitrary, oppressive, or unreasonable

Miswald v Waukesha Cty Bd of Adjstmnt
202 Wis. 2d 401
(Ct. App. 1996)
City of Milwaukee v Leavitt
31 Wis. 2d 72 (1966)

a. Bd may correct prior mistakes without acting arbitrarily. Prior actions or representations made by municipality not a basis for estopping municipality from later enforcing ordinance

Snyder v Waukesha Cty Zoning Bd of Adjstmnt
74 Wis. 2d 468 (1976)

b. Decision of Bd will be found arbitrary or capricious if unreasonable or without rational basis

Klinger v Oneida Cty
149 Wis. 2d 838 (1989)
St ex rel Spinner
v Kenosha Cty
Bd of Adjstmnt
223 Wis. 2d 99
(Ct. App. 1998)

- Ct should not substitute its discretion for that committed to the Bd and should afford Bd's decision presumption of correctness and validity

St ex rel Beierle v
Civil Serv Comm'n
41 Wis. 2d 213 (1969)

4) Whether there is substantial evidence in record to support Bd's decision

Snyder v Waukesha Cty
Zoning Bd of Adjstmnt
74 Wis. 2d 468 (1976)
Clark v Waupaca Cty
Bd of Adjstmnt
186 Wis. 2d 300
(Ct. App. 1994)

a. Findings of Bd should be upheld if any reasonable view of evidence would support them

§ 59.69(5e)(a)2.
§ 60.61(4e)(a)2.
§ 60.62(4e)(a)2.
§ 62.23(7)(de)1.b

b. Statutes require "substantial evidence" in support of the Bd's decision. *Substantial evidence* is defined as "facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion"

AllEnergy Corp v
Trempealeau Cty Env't &
Land Use Comm
2017 WI 52, ¶ 87
375 Wis. 2d 329

NOTE: Before the legislature amended the statutes in 2017, the supreme court had held that public expressions of support or opposition could constitute evidence for a decision on an application for a conditional use permit.

5) Principles for Ct's review of variance cases

a. Presumption is that Bd's decision is correct

b. Focus on purpose of ordinance/statute when deciding whether to grant variance

c. Facts of particular case should be analyzed in light of purpose of ordinance/statute

d. Bd must have flexibility to exercise its discretion

D. Record on review

Lamar Cent Outdoor, Inc v Bd of Zoning Appeals
2005 WI 117
284 Wis. 2d 1

1) Record must show that Bd applied appropriate legal standards, and it must contain reasons for Bd's decision

Edward Kraemer & Sons v Sauk Cty Bd of Adjstmnt
183 Wis. 2d 1 (1994)

2) Under common-law certiorari review, Ct's review limited to the record

3) Ct may take additional evidence or appoint referee to take additional evidence if

a. Record incomplete because party denied opportunity to be fully heard or because Bd excluded relevant evidence

b. Good and sufficient cause shown for failure to have offered evidence to Bd

c. Record does not contain all evidence presented to Bd

d. New evidence discovered

e. Bd's record fails to present hearing in sufficient scope to determine merits of appeal

Klinger v Oneida Cty
149 Wis. 2d 838 (1989)

4) Ct must make record on why it exercised its discretion to take evidence

Arndorfer v Sauk Cty Bd of Adjstmnt
162 Wis. 2d 246 (1991)

5) Parties are encouraged to reconstruct missing or damaged record

Edward Kraemer & Sons v Sauk Cty Bd of Adjstmnt
183 Wis. 2d 1 (1994)
Murr v St Croix Cty Bd of Adjustment
2011 WI App 29, ¶¶ 19–24, 322 Wis. 2d 172

6) If Ct takes no evidence, or substantially similar evidence, Ct applies same standard of review as that applied to common-law certiorari (*See* **CV 26, Sec. 5**)

E. Judgment

§ 59.694(10)
§ 62.23(7)(e)10.

1) Ct may reverse, affirm wholly or partly, or may modify decision brought for review

St v Trudeau
139 Wis. 2d 91 (1987)

a. Ct may remand to Bd to make appropriate findings so as to enable meaningful judicial review

Sojenhomer LLC v
Vill of Egg Harbor
No 2022AP1991
2023 WL 8596080
(Wis. Ct. App.
12/12/2023)
(unpublished opinion
citable per
§ 809.23(3)(b))

b. Ct has discretion to order municipality to grant conditional use permit as remedy upon finding due-process violation could not be cured on remand

6. Special Topics in Zoning

A. Shoreland and floodplain zoning

§ 281.31
St v Waushara Cty
Bd of Adjstmnt
2004 WI 56, ¶ 42
271 Wis. 2d 547
(Bradley, J, dissenting)
St ex rel Ziervogel
v Washington Cty
Bd of Adjstmnt
2004 WI 23, ¶ 22
269 Wis. 2d 549

1) Purpose: To further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses, and reserve shore cover and natural beauty, and protect the public interest in navigable waters

§ 281.11
Just v Marinette Cty
56 Wis. 2d 7 (1972)
St ex rel DNR
v Walworth Cty
Bd of Adjstmnt
170 Wis. 2d 406, 412
(Ct. App. 1992)

2) General supervision and control over navigable waters of State delegated to the Department of Natural Resources (DNR)

St v Kenosha Cty
Bd of Adjstmnt
218 Wis. 2d 396, 406
(1998)

Legislature empowered DNR to develop water conservation standards and provide them to local govts

§ 59.692(1c), (2m)
St ex rel Ziervogel v Washington Cty Bd of Adjstmnt
2004 WI 23, ¶ 15
269 Wis. 2d 549
Wis Adm Code
§ NR 115.05

3) Police power delegated to Counties to enact shoreland zoning ordinances

§ 59.692(1d)
Wis Adm Code
Ch. NR 115

a. Cty ordinances cannot regulate more restrictively than standards set by statute or DNR rule

§ 59.692(2)(b)
§ 62.233
Hegwood v Town of Eagle Zoning Bd of Appeals
2013 WI App 118
351 Wis. 2d 196

b. Cities/Villages may enforce Cty ordinance under certain circumstances, but Towns may only enforce more restrictive ordinances that predate Cty ordinance

§ 59.692(1k), (1n), (1t), (1v)

4) Cty shoreland zoning regulations prohibited as impairing the interest of landowners

a. An ordinance prohibiting, regulating, imposing a fee, or requiring mitigation for installation or maintenance of outdoor lighting intended for residential use

b. An ordinance prohibiting or regulating the maintenance, repair, replacement, or remodeling of a nonconforming structure, a structure in place for more than 10 years, or structure located by operation of a variance before July 13, 2015, if work does not expand the footprint of the structure

c. An ordinance regulating or prohibiting the repair, remodeling, or replacement of a gazebo or other small ancillary structure located partly or wholly within the shoreland setback, if the work does not expand the footprint of the structure

d. An ordinance requiring inspection or upgrade before sale or transfer of the structure

e. An ordinance prohibiting, regulating, or requiring mitigation for the vertical expansion of a nonconforming structure, a structure in place for more than 10 years, or structure located by operation of a variance before July 13, 2015, if the work does not expand the footprint of the structure, unless the vertical expansion extends more than 35 feet above grade level

f. An ordinance prohibiting devices or systems used to manage stormwater runoff within the shoreland setback

g. Enactment or enforcement of an ordinance that establishes standards for impervious surfaces, unless the ordinance is consistent with statutory standards

§ 59.694(7)(c)
Wis Adm Code
§ NR 115.05(4)(e)

5) Variance from terms of ordinance

Sec. 4.C., *supra*

§ 59.692(4)(b)
St ex rel DNR
v Walworth Cty
Bd of Adjstmnt
170 Wis. 2d 406, 411–12
(Ct. App. 1992)

6) DNR has standing to seek certiorari review of Bd decision arising from its role as trustee of the waters of State, but cannot appeal Bd decisions to grant or deny a variance

§ 87.30(2)
St v Trudeau
139 Wis. 2d 91, 100
(1987)

7) Circuit Ct has jurisdiction to enjoin violation of floodplain zoning ordinance

a. Structure, building, fill, or development within floodplain, in violation of ordinance, is public nuisance

§ 87.30(2)(b)

b. Injunction provisions do not apply to certain permitted mining operations

St v Outagamie Cty
Bd of Adjstmnt
2001 WI 78
244 Wis. 2d 613

8) Bd has authority to grant variances from flood elevation requirements when proper statutory standards otherwise met

§ 62.23(7)(i)

B. Community living arrangements

1) Permitted in each city without restriction as to number of facilities, so long as

a. Not within 2,500 feet of any other such facility

b. Total capacity of such community living arrangements does not exceed 25 people or one percent of city's population

c. City may grant exceptions to above

d. Includes community living arrangements for adults as defined in § 46.03(22), community living arrangements for children as defined in § 48.743(1), a foster home as defined in § 48.02(6), or an adult family home as defined in § 50.01(1)

2) Foster home that is primary domicile of foster parent and licensed under § 48.62 or an adult family home under § 50.032(1m)(b) shall be permitted in residential areas and not subject to above

C. Historic preservation

§ 62.23(7)(em)

1) If City contains property listed on national register of historic places in Wis or on State register of historic places, it shall enact an ordinance for the protection of the site and its significant characteristics

2) A City may also create historic and archeological landmarks and establish historic districts

§ 59.69(4m)
§ 60.64(2)

3) A Town or Cty may designate historic landmarks or establish historic districts

§ 59.69(4m)(bm)
§ 60.64(2m)
§ 62.23(7)(em)2m.

4) A Cty, City, Village, or Town must permit owners of historic landmarks to use materials that are similar in design, color, scale, architectural appearance, and other visual qualities when repairing or replacing the property

§ 62.23(7a)

D. Extraterritorial zoning

Walworth Cty v City of Elkhorn
27 Wis. 2d 30 (1965)

1) A City or Village may exercise extraterritorial zoning power over unincorporated areas adjacent to corporate limits of City or Village so that municipality may implement a comprehensive plan for areas in which municipality likely to expand

§ 62.23(7a)(a)

a. Extraterritorial zoning jurisdiction extends to three miles beyond corporate limits of 1st-, 2nd-, or 3rd-class City, in unincorporated areas that are either surrounding or entirely surrounded by a single City or Village

§ 62.23(7a)(a)

b. Extraterritorial zoning jurisdiction extends to one and one-half miles beyond corporate limits of 4th-class City or Village, in unincorporated areas that are either surrounding or entirely surrounded by a single City or Village

§ 62.23(7a)(am)

c. Extraterritorial zoning authority of City or Village limited to area within or contiguous to the location of the primary seat of government, unless Town agrees otherwise

d. Procedure for adopting an extraterritorial zoning ordinance set forth in § 62.23(7a)

State ex rel Vill of Newburg v Town of Trenton

2009 WI App 139
321 Wis. 2d 424

2) A Town cannot circumvent a moratorium prohibiting zoning changes in an area subject to a municipality's extraterritorial zoning by approving land use changes that amount to de facto zoning

§ 236.45(3)(b)
Lake Delavan Prop Co v City of Delavan
2014 WI App 35
353 Wis. 2d 173

3) City cannot circumvent extraterritorial zoning requirements by seeking to regulate land use through its extraterritorial plat approval authority

E. Local Zoning Preemption

1) Local zoning is preempted under certain circumstances, such as

DeRosso Landfill Co v City of Oak Creek
200 Wis. 2d 642 (1996)
Scenic Pit LLC v Vill of Richfield
2017 WI App 49
377 Wis. 2d 280

a. Specified solid waste facilities under § 289.43(8) (formerly § 144.44(7)(g) (1993–94))

Ecker Bros v Calumet Cty
2009 WI App 112
321 Wis. 2d 51

b. Solar and wind energy systems under § 66.0401

ATC v Dane Cty
2009 WI App 126
321 Wis. 2d 138

c. Electric generating facility or transmission line for which certificate of convenience and necessity has been granted under § 196.491(3)(i)

Adams v St Livestock Facilities Siting Rev Bd
2012 WI 85
342 Wis. 2d 444

d. Livestock facility siting and expansion under § 93.90

2) Local zoning is not preempted under certain circumstances, such as:

Adams Outdoor Adver v Cty of Dane
2012 WI App 28
340 Wis. 2d 175

a. When Town approves Cty zoning ordinance under § 59.69(5)(c), a Town billboard ordinance does not preempt Cty's authority to regulate billboards under its zoning ordinance

§ 66.0404(4)
Savich v Columbia Cty

2024 WI App 43
413 Wis. 2d 140
pet for rev filed

b. When local zoning authority regulates mobile siting towers (cell towers); however, the range of conditions that may be imposed under a conditional use permit is limited by statute

F. Prohibited Zoning

§ 66.1015(3)

1) No Cty, City, Village, or Town may enact or enforce an "inclusionary zoning" requirement that a certain number or percentage of residential dwelling units in a land development be sold or rented to individuals or families at or below a certain percentage of the median income

§ 66.10015(2)(e)

2) No Cty, City, Village, or Town may prohibit a property owner from conveying an ownership interest in a "substandard lot," or, if the lot meets certain conditions, from developing a "substandard lot"

§ 66.10015(4)

3) No Cty, City, Village, or Town may require one or more lots to be merged with another without the consent of the owner

G. Residential Development

§ 66.10016(3), *as created by* 2023 Wis. Act 16 (eff 1/1/2025)

1) Zoning permit or approval (excluding ordinance amendment or conditional use permit) for residential development shall be issued if meeting all existing requirements

§ 66.10016(4), *as created by* 2023 Wis. Act 16 (eff 1/1/2025)

Appeal of denial of zoning permit or approval is by mandamus; substantial damages or injury are assumed

§ 781.10(2)(a), *as created by* 2023 Wis. Act 16 (eff 1/1/2025)

2) Judicial review of zoning permit or approval for building or other activity related to residential development is exclusively by certiorari

§ 781.10(2)(b), *as created by* 2023 Wis. Act 16

a. Certiorari appeal must be filed within 30 days after final decision of zoning authority

§ 781.10(2)(d), *as created by* 2023 Wis. Act 16

b. Expedited time limits for submittal of the record, briefing, and decision on certiorari review

CV 34: EMINENT DOMAIN

CONDEMNATION FOR SEWERS AND TRANSPORTATION

1. Proceedings Before the County Condemnation Commission (CCC)

§ 32.08

A. Office of Comm'r of Condemnation

1) Comm'rs appointed by Circuit Judges of Cty

a. Majority vote if more than one Judge

b. Serve at pleasure of Judge(s)

2) Number of comm'rs

a. Counties with a population of less than 100,000—6 comm'rs

b. Counties with a population between 100,000 and 750,000—9 comm'rs

c. Counties with a population of more than 750,000—12 comm'rs

3) Qualifications

a. Resident of Cty or adjoining Cty in same judicial circuit

b. No more than 1/3 of comm'rs in each Cty to be Attys

c. Appointed for 3-year term

§ 32.05(9)(a)

B. Commencement of CCC review initiated by applying to Judge for "Application for County Commissioner of Condemnation Review," hereafter, Application

§ 32.05(2a)

1) If property owner transferred property by deed, Application to be made within six months after date of recording of conveyance

§ 32.05(9)(a)

2) If property owner receives Award of Damages, Application to be made within two years after date of recording of Award

Cmty Dev Auth v Racine Cty Condemnation Comm'n 2006 WI App 51, ¶¶ 18–21, 289 Wis. 2d 613

a. § 801.02(1), may extend two-year deadline by 90 days

§ 32.05(9)(a)

b. Any party having an interest in the property condemned may apply

§ 32.05(9)(a)

C. In the case of housing authority, redevelopment authority, or community development authority, assignment may be commenced by letter to authority requesting it to apply to Judge for assignment of matter to CCC

Schroedel Corp v
St Highway Comm'n
34 Wis. 2d 32 (1967)

D. No filing fee to be paid to Circuit Ct when filing Application

Schroedel Corp v
St Highway Comm'n
34 Wis. 2d 32 (1967)

E. Application to be made in Cty where condemned land is located

§ 32.05(9)(a)

F. Notice of Application shall be given by certified mail or personal service upon both Clerk of Ct and all parties to Award

§ 801.02(1)
City of La Crosse
v Shiftar Bros
162 Wis. 2d 556, 560
(Ct. App. 1991)

1) Notice must be given to all parties to Award within 90 days after submitting Application to Clerk of Ct

DOT v Peterson
226 Wis. 2d 623 (1999)

2) Providing notice to AG instead of condemning state agency (e.g., DOT) may be sufficient

Kyncl v Kenosha Cty
37 Wis. 2d 547 (1968)

3) Providing notice to the Cty instead of the Cty Highway Committee may be sufficient

§ 32.05(9)(a)
St ex rel Milw Cty
Expressway Comm'n
v Spenner
51 Wis. 2d 138, 143
(1971)

G. Upon receipt of proof of service of notice, Judge to make assignment of matter to Chair of CCC

§ 32.05(9)(a)
Cmty Dev Auth v Racine
Cty Condemnation
Comm'n
2006 WI App 51
289 Wis. 2d 613

1) Assignment to CCC before filing proof of service is of no effect

Klump v Cybulski
274 Wis. 604, 614 (1957)

2) Until CCC makes its Award, Judge acts only in administrative capacity. Rules applicable to judicial proceedings not controlling

Schroedel Corp v
St Highway Comm'n
34 Wis. 2d 32, 37 (1967)

3) Judge assigns Application to CCC ex parte

DOT v Peterson
226 Wis. 2d 623, 625
(1999)
Olen v Waupaca Cty
238 Wis. 442, 447 (1941)

4) Reconsideration or review of Judge's administrative decisions may be by writ of mandamus, writ of prohibition, or supervisory writ

Acheson v Winnebago Cty
Highway Committee
14 Wis. 2d 475 (1961)

a. Appellate Ct has no authority to entertain "appeal" before CCC issuance of Award

Schoenhofen v DOT
231 Wis. 2d 508, 525–26
(Ct. App. 1999)

b. Circuit Judge has no administrative authority to reconsider decision to assign Application to CCC, but Judge's action may be construed as a special proceeding, which in turn creates right of appellate Ct review

H. Procedure for CCCs

§ 32.08(3)

1) CCC shall annually elect a Chair

§ 32.08(4)

2) Reimbursement and compensation set by Cty Bd "as … allowed" by the Circuit Judge

3) Chair of CCC shall:

§ 32.08(5)

a. Within 7 days after assignment, select three Comm'rs to hear Appeal

§ 32.08(5)

b. Set time and place for hearing, which shall be no less than 20 and no more than 30 days after assignment

- See form in **Sec. 3**, *infra*

§ 32.08(5)

c. By certified mail or publication, no less than 10 days before date of hearing, notify each interested person or Atty, if represented

4) Comm'rs shall:

§ 32.08(6)(a)

a. First view the property

§ 32.08(6)(a)

b. Then return to appointed place for hearing and allow condemnee to proceed first and to close

§ 32.05(9)
519 Corp v DOT
92 Wis. 2d 276 (1979)
Schoenhofen v DOT
231 Wis. 2d 508, 531
(Ct. App. 1999)

5) At no time should Comm'rs be apprised of amount of Award or amount of Jurisdictional Offer

Attaching Award or Jurisdictional Offer to Application may be harmless error if amount of either is not made known to Comm'rs

§ 32.08(6)(a)

6) CCC is not bound by common law or statutory rules of evidence, but should exclude immaterial, irrelevant, or unduly repetitious testimony

§ 32.08(6)(a)

7) CCC may adjourn the hearing no more than 7 days, or longer upon stipulation of the parties

§ 32.08(6)(b)

8) Hearing may be transcribed upon application of either party with cost to be paid for by requesting party

§ 32.08(6)(b)
Herro v
Natural Res Bd
53 Wis. 2d 157, 176
(1971)

9) Award of CCC shall be made within 10 days after hearing and filed with Clerk of Circuit Ct

a. See form in **Sec. 3**, *infra*

§ 32.08(6)(b)

b. Clerk of Circuit Ct shall record Award in judgment record and shall mail copy of Award to each party in interest

§ 32.08(6)(b)

10) Comm'rs shall, at time of filing Award, file with Clerk of Ct a sworn voucher for compensation due each Comm'r

I. Court's role after CCC review

§ 32.08(4)
Village of Shorewood
v Steinberg
166 Wis. 2d 794
(Ct. App. 1992)
aff'd, 174 Wis. 2d 191
(1993)

Judge shall review and approve requests for compensation and reimbursement of actual expenses to be paid by condemnor

2. Proceedings in Circuit Court

A. Court action to contest right to condemnation

§ 32.05(5)

1) Statutory provisions

a. Action applies to any reason other than amount of compensation offered

b. Owner must commence action in Cty where property is located

c. Action must be commenced within 40 days from date of personal service or 40 days from the postmark of certified mail, or within 40 days after publication of Jurisdictional Offer

d. Such action shall be the only manner in which to raise any issue other than the amount of just compensation

e. Trial of issues shall be given precedence over all other actions then not on trial in Ct in which action to contest right to condemnation is commenced

f. Failure to timely commence the action bars the owner from raising any such objection in any other manner

g. Filing of action does not prevent condemnor from filing petition under § 32.07 regarding necessity of taking

2) Uneconomic remnant issue

a. Property owner has a right to contest the proposed taking because it results in an uneconomic remnant

Waller v
Am Transmission Co
2013 WI 77
350 Wis. 2d 242

b. Landowner may challenge the condemnor's right to take the property using either § 32.05(5) or § 32.06(5) and request that the condemnor offer to purchase the uneconomic remnant as is required under § 32.05(3m) and § 32.06(3m)

c. Uneconomic remnant issue is properly raised in an action under § 32.06(5)

d. Action to declare an uneconomic remnant must be resolved before addressing the adequacy of compensation

e. Whether a property is an uneconomic remnant is a question of both value and whether the property is of substantially impaired economic viability

Waller v
Am Transmission Co
2011 WI App 91
334 Wis. 2d 740

f. If landowner does not file right-to-take action, landowner does not forfeit his or her right, as part of the valuation case, to claim that he or she is left with an uneconomic remnant and that the trier of fact in the valuation case can hear testimony that the after-value of the remainder, is, in essence, an uneconomic remnant

Sojenhomer LLC v Vill of Egg Harbor
2024 WI 25
412 Wis. 2d 244

3) Sidewalks

a. Statutes that bar municipalities from condemning land for pedestrian walkways (specifically, § 32.015 and § 346.02(8)(a)) do not apply to sidewalks

§ 32.05(10)

B. Appeal after CCC review

§ 32.05(10)(a)

1) Notice of Appeal

Gangler v Wis Elec Power Co (In re Petition of Wis Elec Power Co)
110 Wis. 2d 649, 657
(1983)

a. Although labeled "appeal," condemnation proceeding is not appeal in ordinary use of term, but is an action commenced in Circuit Ct

§ 32.05(10)(a)

b. May be filed by any person who was party to CCC proceeding

§ 32.05(10)(a)

c. Shall be filed in Cty where condemned land is located and where CCC proceedings were held

§ 32.05(10)(a)

d. Within 60 days after date of filing of CCC's Award in Circuit Ct

See § 32.06(8), (10)
Dahir Lands, LLC v Am Transmission Co
2010 WI App 167
330 Wis. 2d 556

- Strict compliance with manner of service of CCC's award is required

Gangler v Wis Elec Power Co (In re Petition of Wis Elec Power Co)
110 Wis. 2d 649, 656
(1983)

- Provisions of § 801.15 may be used to compute time under § 32.05(10)

Dairyland Fuels, Inc v St
2000 WI App 129
237 Wis. 2d 467

- Sixty-day period to appeal may be extended if Circuit Ct Clerk delays mailing notice that CCC Award has been recorded

§ 32.05(10)(a)

e. Notice must be given by certified mail or by personal service on all persons who were parties to the proceeding before the CCC

Dairyland Fuels, Inc v St
2000 WI App 129
237 Wis. 2d 467

- Providing notice to AG instead of condemning agency (e.g., DOT) may be sufficient

Landings LLC v
City of Waupaca
2005 WI App 181
287 Wis. 2d 120

- Service of an unauthenticated notice of appeal may be sufficient (the *Landings* case dealt with an appeal under § 32.05(11))

Klump v Cybulski
274 Wis. 604, 609 (1957)

2) Although "appeal" from CCC decision, all issues decided de novo

Hefty v WP&L
(In re Hefty)
236 Wis. 60 (1940)

3) Amount of CCC Award is inadmissible

§ 814.61(8)(am)

4) Filing fee to be paid

§ 32.05(11)

C. Appeal to Circuit Ct without prior CCC review

§ 32.05(11)

1) Notice of Appeal

Gangler v
Wis Elec Power Co
(In re Petition of Wis
Elec Power Co)
110 Wis. 2d 649, 657
(1983)

a. Although labeled "appeal," condemnation proceeding is not appeal in ordinary use of term, but is an action commenced in Circuit Ct

§ 32.05(2a), (11)

b. May be filed by any person named in conveyance or in Award of Damages

§ 32.05(11)
Schroedel Corp v
St Highway Comm'n
34 Wis. 2d 32, 35–36
(1967)

c. Shall be filed in Circuit Ct of Cty where condemned land is located

d. Period of time to file appeal

§ 32.05(2a)

- If property owner transferred property by deed, six months from date of recording of conveyance, or

§ 32.05(11)

- If property owner receives Award of Damages, two years after date of recording of Award

§ 32.05(11)

e. Notice must be given by certified mail or by personal service upon all persons who were parties to Award, as provided in § 32.05(9)(a)

Landings LLC v City of Waupaca
2005 WI App 181
287 Wis. 2d 120

f. Service of an unauthenticated notice of appeal is sufficient

Nesbitt Farms, LLC v City of Madison
2003 WI App 122
265 Wis. 2d 422

2) Notice of claim under § 893.80(1d) is not required

§ 32.05(10)(a), (11)

D. Clerk of Circuit Ct shall enter appeal as pending civil action, naming condemnee as plaintiff and condemnor as Def

Loeb v Bd of Regents
29 Wis. 2d 159, 164
(1965)

1) Purpose of designating condemnee as plaintiff and condemnor as Def is to allocate burden of proof to condemnee and afford condemnee the right to open and close

Gawin v Redev Auth of Milw
52 Wis. 2d 380, 385
(1971)

2) Burden of advancing case for trial, however, is on party instituting the action

Lamar Co v Country Side Rest (In re Petition of Country Side Rest)
2012 WI 46
340 Wis. 2d 335

3) Lessee does not lose right to seek share of award of damages by failing join in landowner's appeal of award

§ 32.05(10)(a), (11)

E. Action shall have precedence over all actions not then on trial

Redev Auth of Green Bay v Bee Frank, Inc
120 Wis. 2d 402,
409–10 (1984)

F. Eminent domain statutes must be liberally construed in favor of landowner

Braun v Wis Elec Power Co

6 Wis. 2d 262, 265 (1959)

G. Consolidation of multiple appeals within discretion of Ct

H. Rules of civil procedure may apply in absence of different procedures set forth in Ch 32

Gottsacker Real Est Co
v St
121 Wis. 2d 264
(Ct. App. 1984)

1) Procedures for Offers of Settlement under § 807.01 do not apply

Dickie v City of Tomah
160 Wis. 2d 20
(Ct. App. 1990)

2) No "answer" to be filed, only a Notice of Appearance

Dickie v City of Tomah
160 Wis. 2d 20
(Ct. App. 1990)

3) Party initiating appeal may dismiss action under provisions of § 805.04(1)

§ 32.05(10)(a), (11)
Berg v Bd of Regents
40 Wis. 2d 657 (1968)

I. Limitation of issue

1) Questions of title, if any, under § 32.11 and § 32.12

2) Amount of just compensation to be paid by condemnor

Pulvermacher Enters
v DOT
166 Wis. 2d 234, 242
(Ct. App. 1991)

3) Issues affecting fair market value of property, such as claims of adverse possession, may be litigated in a valuation action

§ 32.05(5)
Arrowhead Farms, Inc
v Dodge Cty
21 Wis. 2d 647, 652
(1963)

4) All other issues must be raised in "right-to-take" action commenced within 40 days after service of Jurisdictional Offer

§ 32.05(5)
TFJ Nominee Tr
v WI DOT
2001 WI App 116
244 Wis. 2d 242

a. Mere retention of unnegotiated award check should not bar landowner's right to contest right to condemn

§ 32.06(3m), (5)
Waller v Am
Transmission Co

2013 WI 77
350 Wis. 2d 242

b. Whether taking results in an "uneconomic remnant" under § 32.06(3m) must be determined in "right-to-take" action under § 32.06(5)

§ 32.06(5), (3m)
Waller v Am Transmission Co
2013 WI 77
350 Wis. 2d 242

5) Court must determine whether remaining property is an uneconomic remnant before just compensation determination

Waller v Am Transmission Co
2013 WI 77
350 Wis. 2d 242

A taking results in an uneconomic remnant if it substantially impairs the economic viability of the subject property

J. Admission of evidence

Gieseke v DOT
145 Wis. 2d 206
(Ct. App. 1988)

1) Standard of review: whether Circuit Ct erroneously exercised its discretion

Ken-Crete Prods Co v St Highway Comm'n
24 Wis. 2d 355, 359–60
(1964)

a. Jury should be allowed to consider any element that the willing and knowledgeable buyer in the marketplace would consider in setting the price for the property

National Auto Truckstops, Inc v DOT
2003 WI 95
263 Wis. 2d 649

b. Evidence based on income approach is not admissible when comparable sales are available

Hoekstra v Guardian Pipeline, LLC
2006 WI App 245, ¶ 16
298 Wis. 2d 165

c. Evidence of comparable sales does not preclude other evidence on fair market value

Pinczkowski v Milwaukee Cty
2005 WI 161, ¶ 17
286 Wis. 2d 339

d. Even if no condemnation proceedings have been commenced, evidence of sales of property to condemning authority is not admissible if purchaser has power to take by eminent domain

§ 32.09(5)(b), (1m)
Spanbauer v DOT
2009 WI App 83
320 Wis. 2d 242

e. Admissibility of comparable sales occurring with buyers' knowledge of condemnation project is within trial Ct's discretion

Savage v American Transmission Co
2013 WI App 20, ¶ 16
346 Wis. 2d 130

f. Compensation for the taking of an easement is based on an assumption that the condemnor will exercise all the rights that it has taken

Milwaukee Rescue Mission v Redev Auth
161 Wis. 2d 472 (1991)

2) Credibility of witnesses and weight given to their testimony are matters for jury's judgment

Herro v DNR
67 Wis. 2d 407 (1975)

3) Jury has discretion to consider factors underlying an expert's opinion on fair market value

Milwaukee Rescue Mission v Redev Auth
161 Wis. 2d 472, 481
(1991)

a. Evidence as to property values may be introduced by those with technical expertise and those witnesses who have knowledge of value standards with respect to type of land involved

Genge v City of Baraboo
72 Wis. 2d 531, 536
(1976)

b. An owner's opinion as to value can be accepted, but to support a verdict, some basis for that opinion must be shown

260 N 12th St, LLC v DOT
2011 WI 103, ¶¶ 7, 68
338 Wis. 2d 34

c. Evidence of environmental contamination and remediation costs admissible so long as relevant to fair market value

§ 32.09(8)

4) Pretrial orders and disclosure of information

a. Ct may require both parties to submit to the Ct before trial each party's specific contentions regarding

- Highest and best use of property
- Applicable zoning
- Designation of claimed comparable lands, sale of which will be used in appraisal opinion evidence
- Severance damage, if any

- Maps and pictures to be used
- Costs of reproduction less depreciation and rate of depreciation used
- Statements of capitalization of income where used as a factor in valuation with supporting data
- Separate opinion as to fair market value, including before and after value where applicable, not to exceed 3 appraisers
- Recitation of all damages claimed by owner
- Qualifications and experience of witnesses offered as experts

Berg v Bd of Regents
40 Wis. 2d 657 (1968)
Loeb v Bd of Regents
29 Wis. 2d 159 (1965)

K. Burden of proof rests on plaintiff/condemnee

§ 32.05(10)(a), (12)

L. Trial shall be by jury unless waived by both plaintiff and Def

§ 32.05(10), (11), (12)

M. Amount of Jurisdictional Offer or Award of Damages cannot be made known to trier of fact

Standard Theatres v DOT
118 Wis. 2d 730, 742–43 (1984)
Schoenhofen v DOT
231 Wis. 2d 508, 532 (Ct. App. 1999)

N. Provisions of Ch 32 are to be afforded a liberal construction intended to benefit the landowner

O. Judgment

§ 32.05(10)(b)

1) Ct shall enter judgment for amount found to be due (and consider any amount paid by a prior Award)

§ 32.05(11)

2) Jury verdict in relation to basic award

Dorschner v DOT
183 Wis. 2d 236
(Ct. App. 1994)

a. If jury verdict, as approved by Ct, does not exceed basic award: Condemnor has judgment against appellant for the difference between jury verdict and basic award PLUS interest on amount of difference from date of taking

b. If jury verdict, as approved by Ct, exceeds basic award: Appellant has judgment for amount of excess plus legal interest on judgment to date of payment in full from 14 days after the taking

§ 32.05(10)(b)

3) Legal interest

a. If judgment is for condemnor, include legal interest on amount due from date of taking

b. If judgment is for condemnee, include legal interest on amount due from 14 days after date of taking

§ 32.05(10)(c)

4) Payment within 60 days after entry of judgment, unless appeal is taken by any party

P. Costs/litigation expenses

§ 32.28(1)
Standard Theatres v DOT
118 Wis. 2d 730 (1984)

1) Litigation expenses are the sum of costs, disbursements and expenses, and reasonable Atty, appraisal, and engineering fees necessary to prepare for or participate in actual or anticipated proceedings before CCC, Bd of Assessment, or any Ct

Waller v Am Transmission Co
2013 WI 77, ¶ 110 & n.26
350 Wis. 2d 242

Litigation expenses are awarded to address the "imbalance of power between the condemnor and the condemnee" and "to make the landowner whole and to discourage condemnors from shortchanging landowners"

§ 32.28(2)
§ 814.02(2)
Otterstatter v City of Watertown
2017 WI App 76, ¶¶ 27–28, 378 Wis. 2d 697

2) Successful party: Condemnee is successful party under Ch 814 if amount of just compensation found by the Ct or CCC exceeds Jurisdictional Offer or highest written offer before Jurisdictional Offer; no requirement that jurisdictional offer equal the appraisal number

3) Litigation expenses awarded to condemnee if

§ 32.28(3)(a)
Pelfresne v Dane Cty Regional Airport
186 Wis. 2d 538, 544 (Ct. App. 1994)

a. Procedure is abandoned by condemnor

§ 32.28(3)(b)
Warehouse II, LLC v Dept of Transp
2006 WI 62
291 Wis. 2d 80

b. Condemnor does not have right to condemn part or all of property described or no necessity for taking

§ 32.28(3)(c)

c. Judgment for plaintiff in action under § 32.10

§ 32.28(3)(d), (4)

d. Award of CCC exceeds Jurisdictional Offer or highest written offer before Jurisdictional Offer by at least $2,700 (as adjusted for inflation—e.g., in 2024, to $3,434) and at least 15%, and neither party appeals to Circuit Ct

§ 32.28(3)(e), (4)

e. Jury verdict exceeds Jurisdictional Offer or highest written offer before Jurisdictional Offer by at least $2,700 (as adjusted for inflation—e.g., in 2024, to $3,434) and at least 15%

§ 32.28(3)(d)
§ 32.06(2a)
Klemm v Am Transmission Co
2011 WI 37
333 Wis. 2d 580

f. Plaintiff conveys the property by deed or easement before service of Jurisdictional Offer

DSG Evergreen FLP v Town of Perry
2007 WI App 115, ¶ 15
300 Wis. 2d 590

4) Litigation expenses under § 32.28 are only recoverable after the date of the Jurisdictional Offer under § 32.05(3)

§ 32.05(8)

Q. Occupancy

§ 32.05(8)(b)

1) Condemnor denied possession may, within 48 hours' notice, apply for writ of assistance to Circuit Ct where property is located

§ 32.05(8)(b), (c)
§ 32.19

2) Before receiving writ of assistance, condemnor must meet jurisdictional requirements, pay relocation assistance, and identify comparable replacement properties to condemnee, unless condemnee

§ 32.197

a. Waives right to relocation benefits

§ 32.19(2)

b. Is not a displaced person under § 32.19(2)(e)

Ctiy of Janesville v CC Midwest, Inc
2007 WI 93, ¶ 42
302 Wis. 2d 599

3) Condemnor has no open-ended obligation to provide replacement property that is acceptable to condemnee

§ 32.19(2)(e)1.a.
Waller v Am Transmission Co
2013 WI 77, ¶ 116
350 Wis. 2d 242

4) Relocation statute contains no explicit requirement that a person's move must be "forced" or involuntary to render that person "displaced" and entitled to relocation benefits when the move is "a direct result of a written notice of … the acquisition"

3. Forms

STATE OF WISCONSIN CIRCUIT COURT _____COUNTY

Condemnee,

Case No. _____

Condemnor.

ORDER OF ASSIGNMENT TO THE CHAIRPERSON
OF THE CONDEMNATION COMMISSION

The Circuit Court having received the following:

1. Application for Assignment to the _____ County Condemnation Commission.

2. Notice of Application for Assignment to the _____ County Condemnation Commission.

3. Proof that the Notice of Application of Assignment to the _____ County Condemnation Commission has been served upon the Clerk of Circuit Court and all persons who were parties to the Award.

IT IS ORDERED that the Application of the above-named petitioners is hereby assigned to the _____ County Condemnation Commission.

BEFORE THE
CONDEMNATION COMMISSION
FOR _____ COUNTY

Condemnee,

Case No. _____

CONDEMNATION COMMISSION

Condemnor.

NOTICE OF HEARING

TO:
(All persons served with the Notice of Application of Assignment)

PLEASE TAKE NOTICE that the above matter has been assigned to _____, Chairman of the County Condemnation Commissioners, by The Honorable _____, Judge of the Circuit Court for _____ County. The hearing before the _____ County Condemnation Commissioners will be heard by the Commissioners identified below on the _____ day of _____, _____, at __.m., at _____ (location) who will ascertain the compensation to be made for the taking of the condemnee's property.

_____
COMMISSIONER

_____
COMMISSIONER

_____
COMMISSIONER

Dated this ____ day of _____, _____.

_____
Chairperson

BEFORE THE
CONDEMNATION COMMISSION
FOR _____ COUNTY

Condemnee,

Case No. _____

CONDEMNATION COMMISSION

Condemnor.

AWARD

We, the undersigned Commissioners of Condemnation for _____ County, Wisconsin, to whom the above-entitled matter was assigned for hearing, as provided by law, having held such a hearing and concluded the same on the _____ day of _____, ____, do find that the condemnee(s) is/ are entitled to just compensation under Wis. Stat. § 32.09 in the amount of $_____, and that we therefore award this sum.

Dated this _____ day of _____, ___. _____
COMMISSIONER

Dated this _____ day of _____, ___. _____
COMMISSIONER

Dated this _____ day of _____, ___. _____
COMMISSIONER

CV 35: CONSUMER ACT/CREDITOR ACTIONS

Chs 401–427

1. Consumer Act

A. Applicability

§ 421.201(1)

1) In general, the Wis Consumer Act (WCA) applies to consumer credit transactions including:

§ 421.301(9)

a. Consumer credit sales

§ 421.301(12)

b. Consumer loans

§ 421.301(11)

c. Consumer leases

See § 421.301(17)

d. Transactions pursuant to open-end credit plans for personal, family, household, or (for purposes of Ch 427) agricultural purpose

§ 421.201(4)
Ch 427
Credit Acceptance Corp v Kong
2012 WI App 98
344 Wis. 2d 259

e. Wis debt collection activity directed to consumers in Wis

2) Does not apply to the following:

§ 421.202(1)

a. Extension of credit to organizations

§ 421.202(2)

b. Transactions in which all parties are organizations

§ 421.202(3)

c. Certain transactions relating to public utilities or common carriers

§ 421.202(6)

d. Consumer credit transaction, consumer leases, or other consumer transactions in which the amount financed exceeds $25,000

§ 421.202(7)

e. First lien on real estate and other mortgage loans

§ 421.202(8)

f. Securities transactions involving a broker-dealer

Rsidue, LLC v Michaud
2006 WI App 164
295 Wis. 2d 585

g. Assignee of creditor

B. Definitions

1) For more complete listings, see § 421.301

§ 421.301(13)

2) *Consumer transaction*: a transaction in which one party is customer for purposes of the transaction

§ 421.301(17)

3) *Customer*: a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes or, for purposes of Ch 427 only, agricultural purposes

§ 421.301(10)

4) *Consumer credit transaction*: a transaction between a customer and a merchant in which real or personal property or services or money is acquired on credit and the customer's obligation is payable in installments or for which a finance charge is or may be imposed, whether an open-end credit plan or not

§ 421.301(25)

5) *Merchant*: a person who regularly advertises, distributes, offers, supplies, or deals in real or personal property, services, money, or credit that results in, leads to, or induces consumer transactions

6) *Open-end credit plan*: an extension of credit that

a. Permits loans or purchases from time to time

b. May be paid in full or in installments

c. Has a finance charge added on an outstanding balance

d. Treated by a creditor as open-end consumer credit for purpose of any disclosures required under federal law

C. Effects of Consumer Act

§ 422.201

1) Places limits on interest charges

§ 422.202

2) In addition to interest charges, permits certain charges such as the following:

§ 422.202(1)(a)

a. Official fees and taxes

§ 422.202(1)(b)

b. Premiums for property or liability insurance on collateral if creditor takes security interest

§ 422.202(1)(d)

c. Bounced-check costs on non-open-end credit plans

§ 422.202(1)(c)

d. Closing costs on 1st lien on mobile home or credit secured by real property

§ 422.202(2m), (2s)

e. For open-end credit plans, other fees and charges as agreed by the parties

§ 422.203

3) Permits delinquency charges for other than open-end plans

§ 422.207

4) Allows creditor to preserve collateral if customer fails to do so

§ 422.208

5) Allows customer to prepay, in full or in part, at any time, without penalty

§ 422.302

6) Imposes disclosure requirements

§ 422.403

7) Sets maximum periods of repayment for non-open-end transactions based on total amount financed

§ 422.404
§ 241.09

8) Places limits on assignments of earnings, wages, and salaries for payment by customer

§ 422.405

9) Prohibits confession-of-judgment clauses

§ 422.411

10) Prohibits clauses requiring customer to pay Atty fees (with exceptions)

§ 422.407
§ 422.408

11) Makes assignee of creditor subject to all claims and defenses of customer

§ 422.421

12) Allows variable interest rates

D. Creditors' Remedies

§ 425.103(1)

1) A prerequisite to an action to collect on a consumer credit transaction is a default

2) *Default* is defined as:

§ 425.103(2)(b)

a. For open-end credit transactions, a default in payments occurs when a customer fails to pay when due on at least 2 times in any 12-month period

b. For non-open-end credit transaction, a default in payments occurs

§ 425.103(2)(a)

- If intervals between payments is 2 months or less

  — An outstanding amount exceeding 1 full payment that remains unpaid for 10 days after due date or

  — Failure to pay first or last payment within 40 days after due date

- If interval between payments is more than 3 months, to have all or part of 1 payment unpaid for more than 60 days after due date

- If single payment, to have all or part of payment unpaid for more than 40 days

§ 425.103(2)(c)

c. A failure to observe any covenant of the transaction if the breach

- Materially impairs the condition, value, or protection of (or merchant's right in) the collateral or goods subject to the transaction, or

- Materially impairs the consumer's ability to pay

§ 425.104

3) Notice of default and right to cure must be given before suit filed

Security Fin v Kirsch
2019 WI 42, ¶ 2
386 Wis. 2d 388

If it appears notice not provided, unless Def appears and waives lack of notice, Ct shall dismiss action. No other remedies available to Def under Ch 427

4) Consumer has 15 days from notice to cure

2. Creditor Actions Generally

A. Common law, UCC, and MPA application

§ 421.103(1)–(3)

1) Obligations, duties, rights, and remedies provided in UCC (Chs 401–411) and the common law apply unless superseded by particular provisions of WCA

§ 766.03
§ 766.01(8)

2) MPA, Ch 766, applies if obligation incurred by a spouse during marriage

B. Venue

§ 421.401
§ 799.11(1)(b)

1) In consumer actions

§ 801.50(5m)

a. Cty where consumer resides, or if more than one consumer is party to action, Cty where any one of the consumers resides

b. Cty where consumer personally served

c. Cty where collateral located

d. Cty where consumer sought or acquired the property, services, money, or credit that is subject of transaction or signed credit document

§ 421.401(2)

e. If it appears venue not proper, unless Def appears and waives improper venue, Ct shall

Brunton v Nuvell Credit Corp 2010 WI 50 325 Wis. 2d 135
Kett v Cmty Credit Plan, Inc 222 Wis. 2d 117, 129 (Ct. App. 1998) *aff'd*, 228 Wis. 2d 1 (1999)

- For consumer credit transactions, dismiss case for lack of jurisdiction

- For all other consumer actions, not including consumer credit transactions, transfer case to Cty of proper venue

Brunton v Nuvell Credit Corp 2010 WI 50, ¶ 37 325 Wis. 2d 135

- To establish valid venue waiver in consumer credit actions, party claiming waiver must prove that Def knew the place of proper venue and knew that Def had the right to dismissal of case not properly venued

2) In small claims actions

a. Rules for garnishment action in § 799.11(1)(a)

b. In other creditor actions, Cty specified by § 801.50(2)

c. If several Defs, and venue based on residence, venue maybe in Cty of residence of any of them

§ 799.11(3)
Kett v Cmty Credit Plan, Inc 222 Wis. 2d 117, 129 (Ct. App. 1998), *aff'd*, 228 Wis. 2d 1 (1999)

d. If improper venue, Ct to transfer action to proper Cty unless Def appears and waives improper venue

3) Venue in other actions covered by § 801.50

C. Defendant

1) Person(s) signing credit agreement

§ 766.55(2)

2) If obligation incurred "in the interest of the marriage or the family"

§ 803.045(1)

a. Creditor may bring action against the obligated spouse or both spouses

§ 803.045(2)

b. Creditor may bring action against nonobligated spouse alone if cannot obtain jurisdiction over obligated spouse

§ 766.55(1)

c. A statement separately signed by obligated spouse at or before time obligation incurred stating it is "in the interest of the marriage or family" is conclusive evidence of that fact

D. Default

1) In consumer actions

§ 425.105(1)

a. Creditor may not commence any action unless it believes consumer is in default

§ 425.103(2)(a), (am), (b)

b. Default definitions

Indianhead Motors v Brooks
2006 WI App 266, ¶ 10
297 Wis. 2d 821

- Nonpayment if period of nonpayment meets the definition

§ 425.103(2)(c)

- Breach of covenant if breach meets the definition

§ 425.103(2)(bm)

- Material false statements in consumer credit applications related to motor vehicles

E. Notice of default

1) In consumer actions

§ 425.105(1), (3), (3m)

a. With some exceptions, consumer may cure default for 15 days after notice of right to cure default is given

Indianhead Motors v Brooks
2006 WI App 266, ¶ 13
297 Wis. 2d 821

b. Creditor remedies limited until creditor has given notice that fully complies with § 425.104 and 15-day cure period has lapsed

c. Creditor may not

§ 425.105(1)

- Accelerate obligation

§ 425.105(1)
Wis Adm Code
§ DFI-WCA 1.61

- Commence any legal proceeding in a Ct

§ 425.105(1)

- Demand or take possession of "collateral"

- EXCEPT in certain situations related to motor vehicles, see **CV 36, Sec. 1.A.**1)b.

d. Notwithstanding limitations, creditor may

§ 425.105(1)
§ 425.204

- Accept "voluntary surrender" of collateral

§ 425.105(4)

- Dispose of collateral consisting of instruments or documents in creditor's possession that threaten to decline speedily in value

Rosendale St Bank v Schultz
123 Wis. 2d 195
(Ct. App. 1985)

e. Right to cure does not exist if obligation is entirely past due and fully owed

F. Pleading requirements for creditors

§ 425.109(1)(a)–(h)

1) In consumer credit action, complaint must include identification of the consumer credit transaction, description of any collateral or leased goods sought to be recovered, specification of facts constituting alleged default, notice of right to redeem and amount required for redemption, any deficiency claimed, right to cure (if applicable) and amount needed to cure, and accurate copies (or right to accurate copies upon request) of any writings evidencing the transaction

§ 425.109(3)

2) No judgment may be entered upon noncompliant complaint

G. Customer's remedies

§ 425.301–.311

1) Compensatory and punitive damages are provided for violations of Chs 421–427

§ 425.308
LeBakken Rent-To-Own v Warnell
223 Wis. 2d 582
(Ct. App. 1998)

2) Shall collect costs and reasonable Atty fees

§ 425.311

3) Parol evidence rules may not be used to preclude introduction of evidence of violations

§ 421.201(10)(a)
Coady v
Cross Country Bank, Inc
2007 WI App 26, ¶ 12
299 Wis. 2d 420

4) Consumer Act embodies important state public policy; therefore, Wis law applies and will invalidate choice-of-law clauses that specify application of another state's laws

Coady v
Cross Country Bank, Inc
2007 WI App 26, ¶ 55
299 Wis. 2d 420

5) Unconscionable arbitration clause may not be used to compel arbitration

§ 425.401

6) Willful and knowing violations are criminally punishable by a fine not greater than $2,000

Intentional violations of § 425.2065(2) are punishable by a fine not greater than $500

CV 36: REPLEVIN

1. Collateral

A. Recovery of collateral

1) In consumer actions

a. In general

§ 425.109

- Complaint by merchant to enforce any cause of action must meet certain minimum requirements

LeBakken Rent-To-Own
v Warnell
223 Wis. 2d 582
(Ct. App. 1998)

— Failure to meet pleading requirements results in dismissal of action with costs and reasonable Atty fees

§ 425.203
§ 425.205

- Merchant may bring action for recovery of collateral or goods subject to a consumer lease if default, notice of right to cure default, no voluntary surrender, and expiration of 15-day cure period

§ 425.205(1g)(a)
§ 425.206(1)(d)

b. Motor vehicles

- Merchant may take possession of motor vehicle collateral by complying with notice requirements of § 425.205(1g)(a)

- If customer makes demand within 15 days after notice, merchant must proceed in Ct

- If no demand by customer, merchant may take possession without Ct proceeding

c. Repossession before judgment

§ 425.202

- "Collateral" for these purposes means "goods" subject to a security interest

§ 425.206(1)

- No self-help repossession of collateral by merchant before judgment

§ 425.206(1)(d)

— Except for motor vehicles when customer has not demanded Ct action

Nelson v Union Nat'l Bank
111 Wis. 2d 313
(Ct. App. 1983)

- Restrictions on taking possession of collateral do not apply to collateral already in creditor's possession

§ 425.206(1)(a)

- Merchant may take possession of collateral "surrendered" by consumer

— Surrender must be "voluntary" during 15-day cure period

Homa v East Towne Ford
125 Wis. 2d 73
(Ct. App. 1985)

— Surrender need not be "voluntary" following 15-day cure period

§ 425.206(1)(c)

- Merchant may also take possession of abandoned collateral in accordance with § 425.207(2)

§ 425.111(2), (3)

d. Process may be issued before judgment under Ch 811 only to establish lien and restraining order

e. Merchant may bring action for recovery of collateral under either § 425.205 or § 425.203(2)

f. Sec. 425.205 action for collateral/consumer lease goods recovery only

§ 425.205(1)

- A replevin action

- Commenced in small claims Ct regardless of value of collateral

§ 425.205(6)

- May be commenced any time after consumer default, but return date may not be before expiration of 15-day cure period, if applicable

§ 425.205(1)(a)

- Action may be commenced at request of officer or employee of creditor

§ 425.205(2), (3)

- Summons and complaint must be in statutory form

§ 425.205(1)(d)

- Consumer has right to hearing on return date or any adjournment

  — On the issue of default

  — On any other matter that questions validity of creditor's claim to the collateral

§ 425.205(1)(d)

- If consumer fails to appear on return day, judgment may be entered by clerk or Judge in accordance with demands of verified complaint or upon affidavit, sworn testimony, or other evidence

§ 425.205(1)(e)

- Judgment determines only right to possession of collateral

§ 425.205(1)(e)

- Judgment does not bar subsequent action for deficiency judgment

g. Sec. 425.203(2) action for recovery of collateral and deficiency judgment

- Judgment may provide for right to possession of collateral and for deficiency judgment

§ 425.203(3)

- Upon recovery, merchant may retain collateral in full satisfaction of debt or dispose of collateral and seek deficiency judgment

§ 425.203(3)(a)

- If merchant disposes of collateral and seeks deficiency judgment, creditor must apply to Ct to confirm sale upon 8 days' notice to all parties

§ 425.203(3)(a)

- Notice to consumer must advise of right to appear at hearing and to contest any matter set forth in notice

§ 425.203(3)(b)

- At confirmation hearing, Ct must determine

  — Commercial reasonableness of merchant's disposition of collateral

  — Reasonable expenses incurred by creditor in disposition of collateral

— Compliance with § 425.210, if applicable

— Amount to be credited against the judgment and the remaining deficiency

§ 425.207(1)

h. Pending recovery of collateral, merchant may obtain Ct order restraining consumer from impairing creditor's realization of its security interest in collateral

§ 421.201(5)

i. Creditor may take possession of collateral located in other states in accordance with law of that state

2) In other actions

§ 409.601(1)

a. If debtor in default under security agreement, creditor has rights and remedies provided in §§ 409.601–409.628 and those provided by agreement of parties

§ 409.601(3)
Keller Implement v Eiting
52 Wis. 2d 460 (1971)

- Creditors remedies cumulative upon default and may be exercised simultaneously

§ 409.601(1)

b. Creditor may reduce its claim to judgment, foreclose on collateral, or enforce claim, security interest, or agricultural lien by any available judicial procedure

Dorman v Morris
185 Wis. 2d 845
(Ct. App. 1994)

- Secured creditor can retain collateral while seeking independent action for money judgment

§ 409.601(4)

c. Upon default, debtor has rights and remedies provided in §§ 409.601–409.628 and by agreement of the parties

§ 409.601(6)

d. Judicial sale pursuant to execution on judgment is foreclosure of security interest by judicial procedure within meaning of UCC

B. Prejudgment delivery of property

Ch 810

1) In consumer actions

§ 425.111(1)

a. Before entry of judgment in Ch 425 action, no process shall issue with respect to amounts owing or claimed to be owing to consumer by any third person

§ 425.111(2)

b. Process may issue on other property of consumer in accordance with Ch 811 to establish a lien, except that such process shall not be effective to divest consumer of possession until final judgment entered

2) In other actions

§ 810.02

a. Order for prejudgment delivery may be obtained only if

- Issued by Judge or other judicial officer
- Based on affidavit or verified complaint of plaintiff, not Atty

b. Affidavit must specifically allege

§ 810.02(1)

- Plaintiff entitled to possession of property particularly described

§ 810.02(2)

- Property is wrongfully detained by Def

§ 810.02(3)

- Alleged cause of detention

§ 810.02(4)

- Property has not been
  - — Taken for tax, assessment, or fine
  - — Seized under any execution or attachment against property of plaintiff
  - — If so seized, that property is exempt from such seizure

§ 810.02(5)

- Value of property

§ 810.02(6)

- Location of property and sufficient factual allegations for Judge to determine there is reason to believe property is
  - — In location described
  - — In possession of Def or any person acting on behalf of, subject to, or in concert with Def

§ 810.03

- Ct must make findings of fact of all the above to support order for prejudgment delivery of property

§ 810.03

c. Requisition to sheriff requires bond

66 Am Jur 2d *Replevin*
§§ 118–125 (2011)

- Bond protects Def against possible damage for

  — Value of property in case of wrongful replevin

  — Failure to prosecute

  — Costs and damages for detention

  — Cost of return of goods

§ 810.05

d. Motion to vacate or modify order directing delivery of property

- May be made at any time by Def for sufficient cause
- Plaintiff must be given notice

§ 810.13

e. Findings of fact at trial (verdict)

- Whether plaintiff is entitled to possession of property involved
- Whether Def unlawfully took or detained same
- Value of property
- Damages sustained from unlawful taking or unjust detention to time of trial

§ 810.14

f. Judgment may provide for

RMC Form SC-514

- Possession or recovery of possession
- Value of property, if delivery cannot be had
- Damages for detention

Global Steel Prods Corp v Ecklund Carriers, Inc
2002 WI App 91
253 Wis. 2d 588

— In addition to replevin of property, damages available for diminution in value during wrongful detention

- Delivery or forfeiture of bond at plaintiff's option

- If judgment in Def's favor, for return of property, or for value of property and damages for taking and withholding it

C. Right to redeem collateral

§ 425.208

1) In consumer actions

a. Creditor may not dispose of collateral for 15 days after accepting surrender or taking possession of collateral or after legal process is issued with respect to collateral

b. During redemption period, consumer may redeem collateral by any means set forth in statute, including a performance deposit

c. Upon redemption, consumer is restored to all rights under agreement

d. Creditor may dispose of collateral during redemption period if perishable or threatens to decline speedily in value

e. Right of redemption does not apply in agricultural transactions if consumer agrees in writing after default

2) In other actions

§ 409.623(3)

a. Debtor may redeem collateral at any time before creditor has disposed of it, entered into a contract to dispose of it under § 409.610, collected collateral under § 409.607, or accepted collateral in satisfaction of obligation it secures under § 409.622

§ 409.623(2)

b. During redemption period, debtor may redeem collateral by paying all obligations secured by collateral plus expenses incurred by creditor, including creditor's Atty fees and reasonable legal expenses

§ 409.624(3)

c. Debtor may waive right of redemption only by agreement entered into and authenticated after default

D. Disposition of collateral

§ 425.208

1) In consumer actions

§ 425.208(6)

a. Governed by notice, procedure, and commercially reasonable standards of the UCC

§ 422.413

b. Recovery of creditor's expenses incurred is limited

§ 422.411

c. Recovery of creditor's Atty fees is limited

2) In other actions

§ 409.610–.614

a. Disposition must occur in commercially reasonable manner with proper notice

§ 409.615

b. Proceeds of disposition are to be applied in order set forth in statute

3) In all actions

§ 409.615(4)

a. Creditor must account to debtor for any surplus, and unless otherwise agreed, debtor is liable for any deficiency

- Liability limited in consumer actions

§ 409.610(2)

b. Disposition may be by public or private sale

§ 409.610(2)

c. Every aspect of disposition must be commercially reasonable

§ 409.627(3)

- Disposition approved in judicial proceeding or by a bona fide creditors' committee is commercially reasonable

§ 409.627(1)

- Fact that better price could have been obtained by sale at different time or in different method not itself sufficient to establish sale not commercially reasonable

§ 409.627(2)

- Sale is commercially reasonable if creditor sells collateral

— In usual manner in any recognized market for the property

— At price current in such market at time of sale, or

— In conformity with reasonable commercial practices among dealers in that type of property

§ 409.611(2), (4)

d. Notice of sale or intended disposition must be given debtor by creditor unless

- Collateral is perishable or threatens to decline speedily in value

- Collateral is the type customarily sold on recognized market

§ 409.624(1)

- After default, debtor has entered into an authenticated agreement waiving right to notice of sale

§ 409.610(3)

e. Secured party may buy at any public sale

§ 409.610(3)

f. Secured party may buy at private sale

- If collateral is of a type customarily sold on a recognized market, or

- Collateral is of a type that is the subject of widely distributed standard price quotations

§ 409.617

g. Rights of buyer at sale are set forth in statute

§ 409.620(5)

h. Compulsory disposition of collateral may be required if debtor has paid certain percentage of cash price or obligation

2. Judgment

A. Deficiency judgments

§ 425.209

1) In consumer actions

§ 425.203(1)

a. Merchant may bring action to reduce claim to judgment by any available judicial procedure

§ 425.209(2), (3)

b. If underlying transaction was credit sale or "interlocking loan," consumer is not liable for a deficiency if amount owing at time of default was $1,000 or less

§ 425.209(6)

c. If merchant brings action against consumer for debt arising from credit sale or "interlocking loan" when creditor would be prohibited from obtaining deficiency judgment if took possession of collateral, creditor may not take possession following judgment and collateral not subject to levy or sale on execution

§ 425.210

d. If deficiency judgment permitted, amount of judgment based on "fair market value" of collateral

§ 425.111

e. Prejudgment attachment and garnishment prohibited

2) In other actions

§ 409.615(4)

a. Debtor is liable for any deficiency, except

§ 409.615(5)

b. If underlying transaction was sale of accounts, payment intangibles, promissory notes, or chattel paper, debtor is not entitled to any surplus and obligor not liable for any deficiency

B. Property available to satisfy judgment in all actions

1) When debtor married

§ 766.55(2)(b)

a. If obligation was incurred by a spouse and Marital Property Act (MPA) is applicable, may be satisfied from all marital property and all other property of incurring spouse if obligation was incurred "in the interest of the marriage or the family"

§ 766.55(2)(a), (b)
St Mary's Hosp v Brody
186 Wis. 2d 100
(Ct. App. 1994)

b. Obligation to satisfy duty of support to other spouse or to child of the marriage may be satisfied from all marital property and all other property of the obligated spouse, which can include property of nonincurring spouse

§ 766.55(1)

- A statement separately signed by the obligated spouse at or before time obligation is incurred stating that it is "in the interest of the marriage or the family" is conclusive evidence of that fact

§ 766.55(2m), (7)

- Property available to satisfy an obligation of a spouse is available regardless of whether property is located in Wis or whether MPA no longer applies because one or both spouses are no longer domiciled in Wis

§ 766.55(2)(d)

c. Any other obligation incurred by spouse during marriage (except duty of support) may be satisfied from property of obligated spouse that is not marital property and from that spouse's one-half interest in marital property, in that order

§ 766.55(2)(c)

d. Special rules are applicable if obligation was incurred before marriage or before January 1, 1986

§ 766.55(6)

e. Provisions regarding availability of property do not affect the satisfaction of an obligation from collateral or other security

§ 766.55(4m)

f. Provisions of marital property agreements and Ct decrees may not adversely affect interest of creditor unless creditor has actual knowledge of those provisions at time obligation is incurred or open-end credit plan is entered into

§ 766.56(2)(c)

g. Creditor is bound by marital property agreement or Ct decree if applicant spouse discloses its existence and provides a copy before credit is granted or open-end credit plan is entered into

2) When debtor divorced

§ 766.55(2m)

a. Income of nonobligated spouse is not available after a decree of annulment, separation, or divorce unless the decree provides otherwise

§ 766.55(2m)

b. Marital property assigned to each spouse under the decree is available to extent of value of marital property at date of decree

St Mary's Hosp v Brody
186 Wis. 2d 100
(Ct. App. 1994)

- But if support obligation is involved, creditor may reach marital property and "all other property" of the obligated spouse

§ 766.55(2m)

c. If decree provides that nonobligated spouse is responsible for payment of obligation, obligation may be satisfied as if both spouses had incurred it

3) When debtor or spouse dies

§ 859.18(2)

a. At death of a spouse, all property that would have been available to satisfy obligation before death continues to be available after death

§ 859.18(4)

b. If obligated spouse dies (and surviving spouse is not also obligated), property available after death of spouse does not include

- Survivorship marital property
- Joint tenancy property
- Deferred employment benefits
- Life insurance not payable to decedent's estate or assigned or payable to creditor

c. If nonobligated spouse dies, property available after death does not include

- Joint tenancy property transferred to third person
- Deferred employment benefits transferred to third person
- Life insurance transferred to third person

C. Property not available to satisfy judgment

§ 425.106

1) In consumer actions

a. Except when merchant has valid security interest permitted by Chs 421–427, or lien under Ch 779, or when transaction is for medical or legal services and there has been no finance charge actually imposed, following property of consumer is exempt

§ 425.106(1)(a), § 812.34

- Wage exemptions. Unpaid earnings up to 80% of consumer's earnings after all deductions required by law to be withheld

§ 425.106(1)(b)

- Clothing and household items

§ 425.106(1)(c)

- Consumer's principal residence, to extent that fair market value of residence, less outstanding mortgages and liens, is $15,000 or less

§ 425.106(1)(d)

- Amounts required to be paid by consumer as restitution under § 973.20

§ 425.106(2)

b. Spouses may claim above exemptions if action is against marital property in satisfaction of judgment for an obligation described under § 766.55(2)(b)

§ 815.18(3)

2) In all actions

a. Wage exemption

§ 815.20(1)

b. Homestead exemption of $75,000

- Exemption extends to land owned by husband and wife jointly or in common or as marital property

In re Nabbefeld
76 BR 132
(Bankr ED Wis 1987)

- Debtor may claim homestead exemption regarding debtor's lien interest in marital home following divorce, even though no longer resides in home

Anderson v Anderson Tooling, Inc
2021 WI App 39, ¶ 19
398 Wis. 2d 595

- Exemption may become impaired or invalidated if debtors remove themselves from the property or fail to occupy the premises

§ 815.18

c. Personal property exemptions

§ 815.18(3)(h)

- Income—75% of net income for each one-week pay period

§ 815.18(3)(f)

- Life insurance and annuities

§ 815.18(3)(ef)

- Fire and police pension funds

§ 815.18(3)(n)

- War pension

§ 815.18(3)(ds)

- Federal disability insurance benefits

§ 815.18(3)(j)

- Employee retirement benefits

§ 815.18(8)

d. Each spouse may claim the exemptions provided under § 815.18 with respect to any provisional or final process issued to enforce an obligation described under § 766.55(2)(b) against marital property

- If exempt property limited to specified maximum dollar amount, each spouse entitled to one exemption

- Exemption may be combined with other spouse's exemption in same property or applied to different property included under same exemption. However,

- Wage exemption may not be combined with other spouse's exemption and applied to the same property

e. Federal statutory exemptions from execution

45 USC § 231m

- Railroad employees' pensions

42 USC § 407

- Social Security retirement payments

5 USC § 8346

- Civil service retirement payments to federal employees

38 USC § 5301

- Veterans' benefits

D. Judgment lien

§ 806.15(4)

1) A judgment lien attaches to real property held by the nonobligated spouse if

a. That spouse is a named Def in action, and

b. That spouse is named in judgment itself, and

c. Obligation is determined to be an obligation incurred by spouse under § 766.55(2)(b), and

d. Property is either

- Held by nonobligated spouse at time judgment is docketed and is expressly determined to be available under MPA to satisfy obligation, or
- Acquired by nonobligated spouse after judgment is docketed

CV 37: GARNISHMENT

GARNISHMENT FOR PROPERTY OTHER THAN EARNINGS

1. Garnishment Generally

Mahrle v Engle
261 Wis. 485 (1952)
Graham v Zellers
205 Wis. 547 (1931)

A. Garnishment proceedings are purely statutory; provisions must be strictly adhered to

Mahrle v Engle
261 Wis. 485 (1952)
St v Pauli
126 Wis. 65 (1905)

B. Garnishment is a special proceeding in derogation of common law and must be strictly construed to confer jurisdiction

§ 812.01(2a)
Beck v BidRX, LLC
2018 WI App 61, ¶ 23
384 Wis. 2d 207

C. Garnishment action is a separate action

§ 812.01(2)

D. General rules of practice and procedure in Chs 750–758 and Chs 801–847 apply

§ 812.02(2m)

E. Garnishment actions are subject to the limitations of § 806.25

§ 425.111

F. In consumer actions, there shall be no garnishment before judgment

2. Procedure

A. Who may bring action/Against whom

§ 812.01(1)

1) A creditor may proceed against any person who possesses or controls property belonging to the debtor or property subject to a § 766.55(2) (marital property) obligation

a. "Plaintiff" includes judgment creditor

Journal Sentinel, Inc v Schultz
2001 WI App 260
248 Wis. 2d 791

b. "Def" includes judgment debtor or spouse or former spouse of judgment debtor, if judgment is rendered in connection with an obligation described under § 766.55(2)

§ 812.01(3)

2) Individual may commence garnishment action on own behalf or by Atty licensed to practice in Wis

a. Garnishment actions on behalf of any other party shall be commenced only by Attys licensed to practice in Wis

b. Corporation must be represented by Atty or by an authorized full-time employee to commence action

§ 812.02(3)

3) Creditor may proceed against more than one garnishee, or against same garnishee more than once

§ 812.02(2e)

4) Creditor may not commence garnishment action affecting property of spouse who is not Def in principal action unless spouse is Def in garnishment action

B. Prerequisites to filing action

§ 812.02

1) Garnishment may be commenced after

a. Summons and complaint are filed

- In action for damages founded on express or implied contract, or in contract action in which attachment could issue on demands not yet due under § 811.03(3)
- In tort action in which writ of attachment could issue under § 811.03(2)
- In action on a judgment

b. Execution issuable on *in personam* judgment

3. Commencement of Action/Summons and Complaint

A. Commencement

§ 812.04(3)

1) Garnishment action commenced by filing of garnishee summons and annexed complaint provided

Service of authenticated summons and complaint has been made on Def within 60 days after filing

§ 812.04(2)
RMC Form CV-301

2) Form: Garnishment summons must be substantially in statutory form

§ 812.04(1)

3) Clerk of Ct shall issue garnishee summons to plaintiff, with sufficient copies upon payment of fee to clerk (§ 814.62(1))

§ 812.05(3)

4) Any number of garnishees may be joined in same garnishment action

Unless otherwise stated, garnishees shall be deemed to be proceeded against severally

B. Complaint

§ 812.05(1)

1) Before judgment, complaint

§ 812.02(1)(a)

a. Must allege existence of one of following grounds for garnishment

- Action for damages founded on contract, express or implied, or action on contract in which writ of attachment could issue on demands not yet due under § 811.03(3)
- Action on a judgment
- Tort action in which writ of attachment would issue under § 811.03(2)

b. Must also allege amount of plaintiff's claim and disbursements, and fact that plaintiff believes that named garnishee is indebted to or has property in its possession or under its control (other than earnings) belonging to Def

§ 812.05(2)

2) After judgment, complaint must allege

a. That execution is issuable on *in personam* judgment

b. Existence of grounds for garnishment

c. Name and location of Ct, case number, if any, date of entry and amount of judgment on which garnishment based, amount of claim, and disbursements

d. That plaintiff believes garnishee is indebted to or has property in its possession or under its control belonging to Def, and that indebtedness or property is not exempt

4. Service

§ 812.07(1)

A. Summons and complaint must be served on garnishee as required for exercise of personal jurisdiction under Ch 801, except

§ 812.05(4)

If garnishee Def is partnership, service may be made on any partner

B. Papers must be served on principal Def within 10 days after service on garnishee

§ 812.02(2)(b)

If plaintiff unable to obtain personal service on Def, plaintiff may seek order permitting plaintiff to make substituted service on Def's employer

§ 812.02(2)(c)

Before taking judgment based on substituted service, plaintiff shall present affidavit from Def's employer stating that Def in fact received summons

§ 812.07(1), (5)

C. Unless Def served within 10 days after service on garnishee, garnishee action to be summarily dismissed

§ 812.11

5. Answer

A. Garnishee answer must be served within 20 days after service of garnishee summons and complaint

§ 812.14

B. Answer of garnishee shall be taken as true unless plaintiff serves a reply within 20 days after receipt of answer

C. Upon service of reply, issue shall be joined as between plaintiff and garnishee; parties proceed as in ordinary civil actions

6. Payment into Court/Releases

§ 812.13

A. Garnishee may pay amount of liability to Clerk of Ct before case is heard by Ct

B. Judgment may be taken against garnishee before principal action decided, but money paid into Ct to be held by Clerk

C. If no judgment taken against garnishee before judgment in principal action, garnishee shall hold amount of debt until Ct's order

7. Trial

§ 812.14

A. Trial of garnishment shall be to Ct

§ 812.16
Beck v BidRX, LLC
2018 WI App 61, ¶ 24
384 Wis. 2d 207

B. Principal action must be tried before garnishment

§ 812.15

C. Def may answer and defend garnishment action and may participate in trial between plaintiff and any garnishee

1) Def may defend the garnishment upon any ground that a garnishee might defend

2) Garnishee may defend principal action for Def, if Def does not defend, although garnishee liable only for the costs in that action

8. Garnishee Liability and Defenses

§ 812.18

A. From time of service, garnishee liable to creditor for

1) Property then in garnishee's possession or control belonging to debtor or in which debtor interested

a. Except exempt property

b. But not in excess of creditor's claim

Ag Servs of Am, Inc v Krejchik
2002 WI App 6
250 Wis. 2d 340

c. But not for partnership property if Def a partner and partnership not named

§ 812.19(1)

B. No person shall be liable as garnishee

1) By reason of having drawn, accepted, made, endorsed, or guaranteed any negotiable instrument

2) By reason of anything received or collected by him or her by execution or other process

3) By reason of any money in person's hands as public officer

Olen v Phelps
200 Wis. 2d 155
(Ct. App. 1996)

4) By reason of anything owing by person on a contingency

5) If simply bank or safe deposit company where Def has safe deposit box

§ 812.19(5)

Property in safe deposit box is not property in control of bank or safe deposit company

6) Except as provided above, judgment may be given for anything owing, although it has not become due; in such case, garnishee shall not be required to pay or deliver it before time appointed by contract

Debt owing by owner of property subject to construction lien (per § 779.01) not due until claims of subcontractors and employees have matured or expired

§ 812.20

C. Actions stayed

1) Except by Ct order, no action shall be commenced by Def against garnishee upon any garnished claim or demand or to recover garnished property, or execution issued until termination of garnishment action

2) If action has been commenced or execution issued, it shall be stayed by Ct as to garnishee, upon garnishee's application

§ 812.24

3) Creditor may be subject to penalty for violating § 812.01(3) or § 812.02(2)

EARNINGS GARNISHMENT

1. Earnings Garnishment, Generally

A. Procedure

§ 812.31(1)

1) General rules of practice and procedure in Chs 750–758 and Chs 801–848 apply

2) § 799.06(2) (person may represent self) shall apply to actions under subch II of Ch 812 (i.e., §§ 812.30–.44)

§ 812.31(2)

B. Venue

1) Venue for earnings garnishments is per § 801.50

Garnishee deemed to be a Def for purposes of § 801.50

§ 812.31(3)

2) Earnings garnishment may not be commenced in a Cty other than the Cty where judgment is entered unless a transcript of judgment is entered in that Cty

§ 812.31(4)

C. Parties are designated as creditor, debtor, or garnishee

In pleadings or other documents

D. Fees

§ 812.33

1) Creditor shall pay $15 fee to garnishee for each earnings garnishment or each stipulated extension

2) Fee is included as cost in creditor's claim

§ 812.33
§ 812.42

3) Creditor to pay $3 for each payment delivered after first payment

Deducted from money delivered to creditor

2. Exemptions for Earnings Garnishment

§ 812.34(1)

A. Exemptions provided in this section do not apply if judgment debt is

1) Ordered by a Ct under § 128.21 (for amortization of debt) or by any Ct of the US under 11 USC 1301–1330, or

2) For support of any person, or

3) For unpaid taxes

§ 812.34(2)(a)

B. Unless Ct grants relief after hearing as provided in § 812.38(2) or unless § 812.34(2)(b) or (c) applies, 80% of debtor's disposable earnings are exempt from garnishment

§ 812.34(2)(b)

C. Debtor's earnings are totally exempt from garnishment, IF

1) Debtor's household income is below the poverty line, (see end of chapter for current poverty guidelines), or

2) Debtor receives need-based public assistance, has received such assistance within 6 months before service of garnishment, or has been determined eligible to receive need-based assistance although actual receipt has not yet commenced

§ 812.35(1a)
§ 138.14(1)(k)

3) Amount is owed by debtor for payment of "payday loan"

§ 812.34(2)(c)

D. If garnishment of 20% of debtor's disposable income would result in debtor's household income being below poverty line, amount of garnishment is limited to debtor's household income in excess of poverty line before garnishment is in effect

§ 812.34(3)
RMC Form CV-426

E. Judicial conference must adopt and make available schedules and worksheets to assist debtors in computing their eligibility for exemption

RMC Form CV-427

1) Poverty guidelines chart at end of chapter is example of one such schedule

2) Schedules to be revised annually

3. Commencement of Action/Answer

§ 812.35(1)

A. Notice

RMC Form CV-421

Judgment creditor must file garnishment notice with Clerk of Ct and pay garnishment fee (§ 814.62(1))

B. Service on garnishee

§ 812.35(2)
RMC Form CV-422

1) Clerk issues 2 earnings garnishment forms per garnishee

§ 812.35(3)

2) Creditor must serve one form on debtor and other on garnishee

a. Both must be served within 60 days after notice filed

Kenosha Hosp & Med Ctr
v Garcia
2003 WI App 142

265 Wis. 2d 900, *rev'd*
2004 WI 105
274 Wis. 2d 338

b. Service may be by first-class mail or certified mail with return receipt requested or any other means permissible for service of a summons in a civil action, except publication

- Garnishee can be served by other means if it signs an admission of service

§ 812.35(4)(a)

3) Garnishee fee must be tendered at time form is served upon garnishee

§ 812.35(4)(c)

4) No answer or Ct appearance required on behalf of garnishee

§ 812.35(5)

5) Garnishment period is 13 weeks

C. Service on debtor

§ 812.35(4)(b)
RMC Forms
CV-423, 424, 426, 427

1) Creditor must serve an Exemption Notice, Debtor's Answer Form, Garnishment Exemption Worksheet, and Poverty Guidelines chart upon debtor at time garnishment form is served (forms available from clerk and on Wisconsin Court System's website: https://www.wicourts.gov)

§ 812.35(4)(c)

2) Debtor must be served within 7 business days after garnishee is served, and at least 3 business days before the pay day of the first pay period affected by the garnishment

a. Service by mail is complete upon mailing

§ 812.30(1)
§ 421.301(6)

b. "Business days" exclude Saturdays, Sundays, and legal holidays

D. Garnishee duties

§ 812.35(5)

1) Garnishee must determine whether it will owe earnings to the debtor for pay periods that begin within 13 weeks after service

a. If not, garnishee must send statement of this fact to creditor within 7 business days after date garnishee served with garnishment

b. Creditor must send copy of statement to Ct within 7 business days after receiving the statement

§ 812.35(6)

2) Only one garnishment can affect any pay period

a. If another garnishment already in effect, garnishee must begin new garnishment the pay period after all prior garnishments terminate

- Even if nonexempt earnings remain after first judgment satisfied

b. Garnishee must notify debtor of amount of any prior or pending garnishment and must notify creditor of amount owed on all pending garnishments within 7 business days after receiving garnishment form

c. If it later appears that garnishee will no longer owe debtor for earnings, the garnishee must notify creditor and Ct within 7 business days after determining that earnings will not be owed

d. Priority of garnishments determined by order of service

E. Debtor's answer

§ 812.37(1)
RMC Form CV-424

1) Debtor may claim an exemption under § 812.34(2)(b), or a limit to garnishment under § 812.34(2)(c), or assert a defense by completing answer form

a. Answer must be delivered or mailed to garnishee, not Ct

b. Answer or amended answer may be filed any time before or during the effective period of the garnishment

c. May be filed by debtor or debtor's spouse

§ 812.37(2)

2) If garnishee receives an answer/amended answer, it must mail a copy to the creditor within 3 business days

Copy of answer sent to creditor must contain date garnishee received the answer

§ 812.37(3)

3) Unless served with Ct order directing otherwise, garnishee must accept as true all exemptions claimed in any answer/amended answer received before payment made to creditor

4. Motions and Hearing

A. Motions that may be made

§ 812.38(2)

1) Following motions/petitions may be made at any time during pendency of garnishment action

§ 812.38(1)(a)

a. Creditor may file a motion for a hearing and a written objection to the answer

RMC Form CV-425

- Official form in statute

§ 812.38(1)(b)

b. Debtor may file a written petition for relief if the exemption percentage calculated under § 812.34(2)(a) is insufficient for the debtor to acquire necessities for debtor/dependents

- Petition must state with reasonable specificity grounds for relief requested

§ 812.38(1)(c)

2) Any party may move the Ct to order another party to comply with Ch 812, or for other equitable relief

B. Hearing

§ 812.38(2)

Within 5 business days after motion or petition for relief filed, Ct must schedule a hearing, which must be held as soon as practicable

Ct must notify parties of hearing place and time

C. Ct action after hearing

§ 812.38(2)

1) After hearing, Ct shall make findings of fact, conclusions of law, and such orders as are necessary

a. If Ct orders garnishment to proceed, date order is served upon garnishee shall substitute for original date of service for purpose of determining the 13-week garnishment period

b. Order is binding on garnishee as of date of service

§ 812.38(3)(a), (b)

2) If debtor's answer or creditor's objection to answer was asserted in bad faith, Ct shall award other party actual damages, costs, and reasonable Atty fees resulting from additional proceedings

§ 812.38(3)(c)

a. Ct may order judgment for these amounts

b. If party in whose favor Atty fee is awarded is not indebted to his/her Atty, Ct shall award fee directly to Atty and enter judgment in favor of Atty

Comment

c. No similar provision if debtor's petition for relief filed in bad faith

3) Upon notice and motion, Ct may make any order necessary to protect rights of interested parties

5. Payment to Creditor

A. When payment to be made

§ 812.39(1)

For each pay period during garnishment period, garnishee shall pay creditor that portion of debtor's nonexempt disposable earnings to which creditor entitled

Amount must be paid to creditor between 5 and 10 business days after each payday

§ 812.39(2)

B. Ct-ordered assignment of earnings for support or maintenance (Ch 767) take priority over earnings garnishment

1) Regardless of date garnishee first receives notice of assignment

2) If earnings are subject to an assignment under § 767.75, creditor only entitled to 25% of debtor's disposable earnings minus amount assigned

§ 812.39(3)

3) Garnishee to notify debtor of any amounts paid to creditor at time earnings are paid to creditor

C. Creditor and debtor may stipulate to extension

§ 812.40

1) While earnings garnishment in effect, creditor and debtor may stipulate in writing to extension of garnishment for additional pay periods

a. Extension commences on first day after garnishment ends and ends within 13 weeks after last day of last pay period affected by the garnishment

b. Garnishee bound by extension if copy of extension delivered or mailed to the garnishee, with an additional garnishment fee, before last day of pay period affected by garnishment or any prior extension

§ 812.33

- Creditor must pay garnishment fee of $15 to garnishee and fee of $3 for each payment delivered to creditor after first payment

§ 812.40

2) Extension void if garnishee served with garnishment by another creditor against debtor before last day of last pay period affected by garnishment

Garnishment fee must be returned

6. Garnishee Liability

A. Creditor's claim

§ 812.41(1)

1) If garnishee fails to pay amount due creditor within time allowed, creditor may seek judgment against garnishee

   a. For amount of unsatisfied judgment plus interest and costs

   b. Creditor must give notice to all parties

2) Affirmative defense: Amount creditor should have been paid under garnishment is less than the unsatisfied judgment balance

   If true, garnishee's liability limited to greater of amount creditor should have been paid or $100

B. Debtor's claim

§ 812.41(2)

1) If garnishee deducts more from earnings than authorized, debtor may seek judgment against garnishee for actual damages

§ 812.41(3)

2) Affirmative defense: Wrongful conduct was unintentional and result of bona fide error notwithstanding use of procedures reasonably adapted to avoid such error

   If true, liability limited to return to debtor of improperly paid amount

7. Term of Garnishment/Fees

A. Garnishment remains in effect

§ 812.35(5)

1) For 13 weeks if debtor NOT employee of State or local government

§ 812.42(2)(b)

2) Until judgment satisfied, if debtor employee of State or local government

   Unless sooner terminated by Ct order

§ 812.405

3) Until judgment satisfied, if garnishment payable to a debtor who owes victim restitution ordered under § 973.20(1r)

   Unless sooner terminated by Ct order

§ 812.35

B. Garnishment form to be served upon the following if debtor NOT employed by State or local government

1) Employer and

2) Debtor

§ 812.42(2)(a)

C. Garnishment form to be served upon the following if debtor employed by State or local government

1) State: Dept of Administration

2) 1st-class city: City treasurer

3) Other political subunit: Secretary or clerk of municipality or agency for which debtor works

4) Debtor

§ 812.42, § 812.33

D. Creditor must pay following fees

1) $15 to garnishee

Payment to secretary of administration or political subdivision if debtor is State or local government employee

2) Additional $3 for each payment after first payment

Deducted from amount paid to creditor

8. Retaliation Prohibited

§ 812.43

A. Garnishee cannot impose fee or take any adverse action because of garnishment

1) Unless permitted by collective bargaining agreement

2) If violated, debtor may bring civil action

9. Forms/Charts

RMC Forms
CV-421 to CV-427

A. Forms

§ 812.44(1)(b)

1) Parties cannot use forms substantially different from those prescribed by statute

§ 812.44(1)(bg)

Except in limited circumstances described in § 812.34(1)

§ 812.44(1)(b)

2) Parties cannot alter forms to make them misleading

§ 812.44(1)(c)

3) Garnishee does not have to answer form that does not identify parties, is illegible, or is unintelligible

a. Garnishee must return form in above condition to creditor (if known) within 3 days with statement specifying defect and that garnishee is not acting as required

b. Garnishee NOT liable for refusing to act

89 FR 2961 (1/17/2024)
RMC Form CV-427

B. Poverty guidelines chart

POVERTY GUIDELINES FOR EARNINGS (For earnings from July 1, 2024, through June 30, 2025)				
Size of Family	Weekly	Bi-weekly	Semi-monthly	Monthly
1	290	579	628	1,255
2	393	786	852	1,703
3	497	993	1,076	2,152
4	600	1,200	1,300	2,600
5	703	1,407	1,524	3,048
Each additional family member	Add $103 to above amount	Add $207 to above amount	Add $224 to above amount	Add $448 to above amount

CV 38: ATTACHMENT

1. Chapters

811 and 425

A. In general

§ 811.01

1) Any creditor may attach property of its debtor in cases, upon conditions, and in manner prescribed by Ch 811

§ 811.001(2)

2) "Def" includes Def's spouse or former spouse if action against Def is in connection with obligation described in § 766.55(2) of Marital Property Act (MPA)

§ 811.001(2)

3) "Property of debtor" and "property of Def" include marital property interest of debtor's or Def's spouse or former spouse if action against debtor or Def is in connection with an obligation described in § 766.55(2) of MPA

§ 425.111

4) Prejudgment attachment is prohibited in consumer actions

2. Non-Consumer Act Attachment

Pratt v Pratt
2 Pin 395 (1850)

A. Proceedings by attachment are among most summary and stringent known to law and should strictly conform to statute authorizing them

§ 811.02

B. Form of writ

1) Must be issued by Judge or other judicial officer

2) Issued only after summons and complaint are filed

3) Issued at any time before final judgment

4) Directed to sheriff of Cty in which Def's property is supposed to be

a. Requires sheriff to attach all property of Def within Cty, or as much of property as sufficient to satisfy plaintiff's demand, together with costs and expenses

5) If amount of money sought was excluded from demand for judgment, Ct must require plaintiff to

a. Specify amount of money claimed

b. Provide information on amount of money claimed to Ct and to other parties

c. Provide information before issuing the writ

§ 811.03(1)

C. Basis for attachment, if founded on contract or underlying judgment

1) Plaintiff must file affidavit setting forth specific factual allegations

a. Debt exceeds $50

b. Debt due upon contract or judgment

c. Plaintiff knows or has good reason to believe one of the following

§ 811.03(1)(a)

- Def is absent from Wis, or is concealed in Wis so that summons cannot be served

§ 811.03(1)(b)

- Def has disposed of, concealed, or is about to dispose of or conceal property or some part of Def's property with intent to defraud creditors

§ 811.03(1)(c)

- Def has removed, or is about to remove, property from Wis with intent to defraud creditors

§ 811.03(1)(d)

- Def fraudulently incurred obligation upon which action is brought

§ 811.03(1)(e)

- Def is not a resident of Wis

§ 811.03(1)(f)

- Def is a foreign corporation, or if domestic, no officer or agent on whom to serve summons exists or resides in Wis or can be found

§ 811.03(1)(g)

- Action is against Def as principal on bond to recover money due State, Cty, or municipality located in State

§ 811.03(1)(g)

- Action is against Def as principal on bond or other instrument given as evidence of debt for, or to secure payment of, money embezzled or misappropriated by Def as officer of State, or of Cty or municipality located in State

§ 811.04

2) Affidavit may be amended at any time before trial

D. Basis for attachment, if founded on tort action

§ 811.03(2)

1) Plaintiff's affidavit must allege

a. Cause of action in tort exists in favor of plaintiff and against Def

b. Damages exceed $50

§ 811.03(2)(a)

c. Def is not a resident of Wis, or

d. Def's residence is unknown and cannot be ascertained with due diligence, or

§ 811.03(2)(b)

e. Def is a foreign corporation

§ 811.04

2) Affidavit may be amended at any time before trial

E. Basis of writ of attachment issued on demand not yet due

§ 811.03(1), (3)

1) Plaintiff's affidavit must allege

a. Debt exceeds $50

b. Debt is to become due upon contract or judgment

c. Plaintiff knows or has good reason to believe one of the following

§ 811.03(1)(a)

- Def is absent from Wis, or is concealed in Wis so that summons cannot be served

§ 811.03(1)(b)

- Def has disposed of, concealed, or is about to dispose of or conceal property or some part of Def's property with intent to defraud creditors

§ 811.03(1)(c)

- Def has removed, or is about to remove, property from Wis with intent to defraud creditors

§ 811.03(1)(d)

- Def fraudulently incurred obligation upon which action is brought

d. Bond required by § 811.06 must be conditioned in 3 times amount demanded

e. If writ of attachment issued before maturity of debt and traverse to attachment sustained by Ct, Ct must render judgment against plaintiff for damages and costs

§ 811.04

2) Affidavit may be amended at any time before trial

§ 811.06

F. Bond

1) Must be filed before writ of attachment is executed

2) Affidavit of surety must be annexed to bond

a. Must state that surety is resident and householder or freeholder within Wis

b. Must state that surety is worth in property double the sum specified in bond, exclusive of surety's debts and exclusive of property exempt from execution

3) Not necessary when plaintiff is State, Cty, town, or municipality located in State

4) Set by Judge or judicial officer issuing writ

5) In amount sufficient to provide adequate security to Def for any damages Def may sustain by reason of attachment

a. Provides that if Def recovers judgment, plaintiff shall pay all damages that Def may sustain by reason of attachment

6) Potential items of damages to consider in setting amount of bond

a. Injury to or depreciation of property

b. Prevention of advantageous sale

c. Loss of use or profits

d. Injury to credit

e. Mental suffering

f. Costs and Atty fees

g. Punitive damages

§ 811.07

7) Def may apply for additional security for damages

§ 811.09

G. Alias writs

1) May be issued to sheriffs of different counties

2) Copy of affidavit and bond annexed to original must be annexed to alias writ

H. Modification of writ

§ 811.18

1) Judge may, at any time, vacate or modify writ of attachment on motion of Def for any sufficient cause

§ 811.18

2) Motion to vacate or modify may be combined with motion to increase plaintiff's security

§ 811.19

a. Motion to vacate or modify shall be heard forthwith by Ct

§ 811.19

b. Burden of proof is on plaintiff

§ 811.19

c. Assignees of Def may move to vacate or modify in same manner as that provided for Def

I. Intervention

§ 811.26

1) Any person not a party to action whose property is attached, may at any time, either before or after judgment, be made a party upon application

2) Object is to remove or discharge attachment

§ 811.26

3) Summary relief

a. Ct may grant such summary relief as shall be just

b. Ct may in proper cases award an issue for trial by jury

CV 39: FORECLOSURE

Ch 846

1. Mortgage Foreclosure

A. Jurisdiction and venue

§ 801.07(2)
§ 753.03

1) Ct may exercise jurisdiction *in rem* or *quasi in rem* when action is to foreclose a mortgage claim upon real estate within Wis

Frick v Howard
23 Wis. 2d 86, 96 (1964)

2) Proceedings are equitable in nature

Neff v Barber
165 Wis. 503 (1917)

a. Therefore, no right to jury trial

Norwest Bank Wis of Eau Claire v Plourde
185 Wis. 2d 377
(Ct. App. 1994)

b. If Def asserts counterclaims, however, jury trial available if

Green Spring Farms v Spring Green Farms
172 Wis. 2d 28
(Ct. App. 1992)

- Issue preclusion (collateral estoppel) would bar Def from asserting claims in a separate action, or

ABCG Enters v First Bank SE
178 Wis. 2d 370
(Ct. App. 1993)
aff'd, 184 Wis. 2d 465
(1994)

- Facts, events, or transactions are same and claim preclusion (res judicata) would bar subsequent action

§ 801.50(2)(b)

3) Proper place of trial is Cty in which real property or some part of real property that is subject of claim is located

§ 806.14

4) Judgment of foreclosure can affect real estate situated in two counties

§ 840.10(1)

5) *Lis pendens* (due notice of pendency of action) must be recorded with Register of Deeds

a. Certified copy of *lis pendens* is part of Ct record

§ 846.01

b. Judgment shall not be entered until 20 days after *lis pendens* is recorded

Cadavini v Larson
211 Wis. 200, 206 (1933)

6) Direct action on the note can be combined with action for foreclosure and sale of property

White Eagle Bldg & Loan Ass'n v Freyer
231 Wis. 563, 567–68
(1939)

Money judgment on the note must be satisfied to extent of net proceeds of foreclosure sale

Bank of Sun Prairie v Marshall Dev Corp
2001 WI App 64, ¶¶ 6–20
242 Wis. 2d 355

7) Upon entry of deficiency judgment, claim on note merges into deficiency judgment

But action to foreclose a different mortgage securing same debt not precluded by merger doctrine

§ 806.02

B. Default judgment

1) Any Def appearing in the action is entitled to notice of motion for judgment

Judicial Council Comm
Note, 1981

2) In its discretion, Ct may determine facts necessary for judgment from affidavits; however,

§ 806.02(2)

If amount of money sought is excluded from demand for judgment, plaintiff required to specify amount before Ct rendering of judgment

§ 840.07
Geneva Nat'l Cmty Ass'n v Friedman
228 Wis. 2d 572, 588
(Ct. App. 1999)

3) Evidence in record must support findings; a hearing is not required for default judgment to be granted

C. Evidence required

1) Plaintiff has burden of proving terms of indebtedness secured by mortgage

Mitchell Bank v Schanke
2004 WI 13, ¶ 32
268 Wis. 2d 571
Dow Fam, LLC v PHH Mortg Corp
2014 WI 56
354 Wis. 2d 796

a. Mortgage cannot exist without a debt

Dow Fam, LLC v PHH Mortg Corp
2014 WI 56
354 Wis. 2d 796
PNC Bank, NA v Bierbrauer
2013 WI App 11, ¶ 10
346 Wis. 2d 1

b. Plaintiff/foreclosing entity must prove it has the right to enforce the note

- Ownership of note and mortgage in event of assignment by original mortgagee

— Ownership of note not required to enforce

§ 403.301
PNC Bank, NA v Bierbrauer
2013 WI App 11, ¶ 10
346 Wis. 2d 1

— Holder of a note has the right to enforce note

§ 403.205(2)
Dow Fam, LLC v PHH Mortg Corp
2014 WI 56
354 Wis. 2d 796

Bank of Am NA v Neis
2013 WI App 89, ¶ 7 n7
349 Wis. 2d 461
PNC Bank, NA
v Bierbrauer
2013 WI App 11, ¶ 12
346 Wis. 2d 1

— A note endorsed in blank becomes payable to the bearer and may be negotiated by transfer of possession alone

Deutsche Bank Nat'l
Tr Co v Wuensch
2018 WI 35, ¶ 2
380 Wis. 2d 727

— Presentment of the original, wet-ink note at a trial establishes the holder's possession, and thus, right to enforce note

Dow Fam, LLC v
PHH Mortg Corp
2014 WI 56, ¶ 40,
354 Wis. 2d 796

- Under the doctrine of equitable assignment, a mortgage is automatically transferred by operation of law when the note is transferred

§ 910.03

c. Copies are admissible unless genuine issue of authenticity raised, or it would be unfair

§ 909.01
Dow Fam, LLC v
PHH Mortg Corp
2014 WI 56
354 Wis. 2d 796

- Plaintiff/foreclosing entity must submit evidence to support a finding that copy is a true and correct copy of an original, or that plaintiff/foreclosing entity has possession of the original

Dow Fam, LLC v
PHH Mortg Corp
2014 WI 56
354 Wis. 2d 796
Bank of Am NA v Neis
2013 WI App 89, ¶ 49
349 Wis. 2d 461

- Contracts, including promissory notes, are not hearsay when offered only for their legal effect, not to prove the truth of the matter asserted

Mitchell Bank v Schanke
2004 WI 13, ¶ 42
268 Wis. 2d 571

- Note need not be physically produced if its existence, terms, and conditions can be established through other evidence

§ 706.001(2)
Dow Fam, LLC
v PHH Mortg Corp
2014 WI 56
354 Wis. 2d 796

— Statute of frauds does not require a written assignment of mortgage; mortgage is equitably assigned to holder of note by operation of law

Mitchell Bank v Schanke
2004 WI 13, ¶ 32
268 Wis. 2d 571

d. Consideration for mortgage conclusively presumed if signed under seal

2) Nature and amount of default and amount of delinquency owed by default

§ 908.03(6)
Bank of Am NA v Neis
2013 WI App 89, ¶ 14
349 Wis. 2d 461

a. Payment history, notice of intent to accelerate, and account information statement are admissible under § 908.03(6) hearsay exception for "records of regularly conducted activity"

§ 908.03(6)
Bank of Am NA v Neis
2013 WI App 89, ¶¶ 18, 20–21, 349 Wis. 2d 461
Palisades Collection LLC v Kalal
2010 WI App 38, ¶ 21
324 Wis. 2d 180

b. Custodian or other qualified witness need not be original owner of records. Testifying custodian must be qualified to testify that (1) records were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) this was done in the course of a regularly conducted activity. Affiant needs to have personal knowledge (1) of how records were prepared and (2) that they were prepared in the course of a regularly conducted activity

Committee Comment

c. When plaintiff seeks amounts not listed in the complaint (e.g., property maintenance or other costs), consider *Stein v Illinois State Assistance Commission*, 194 Wis. 2d 775 (Ct. App. 1995), which held that, in case of default judgment, relief is limited to that which is demanded in plaintiff's complaint. Also, an affidavit asserting amounts not set forth in the complaint becomes part of the pleadings and must be served in the same manner as a pleading. If not, the judgment is void

§ 846.10(1)

3) Present balance due, including any charges and additional interest not set forth in complaint, such as insurance payments, tax advances, and others

Harbor Credit Union v Samp
2011 WI App 40, ¶ 42, n10, 332 Wis. 2d 214

4) Amount due is amount due under the mortgage being foreclosed not including amounts due under other mortgages on the property

5) Interests claimed by other than mortgagor-Defs

§ 846.10(1)

6) Nature and occupancy of mortgaged premises

a. Is it Def's homestead?

b. Is it under 20 acres in size?

c. Is it commercial property?

d. Is it owner-occupied?

e. Can property be sold in more than one parcel?

7) Plaintiff's election of period of redemption if mortgage subject to § 846.101 or § 846.103(2)

Valley Bank v Jennings
198 Wis. 2d 857
(Ct. App. 1995)

Burden of proof on plaintiff to establish facts to reduce period of redemption

8) Costs, disbursements, and Atty fees claimed

§ 846.11
Valley Bank v Jennings
198 Wis. 2d 857
(Ct. App. 1995)

D. Homestead

Geneva Nat'l Cmty Ass'n v Friedman
228 Wis. 2d 572, 589
(Ct. App. 1999)

1) A person may only have 1 homestead at a time

2) If mortgaged premises include both homestead and other lands that can be sold separately at Sheriff's sale, without injury, other lands must be sold before homestead sold

E. Periods of redemption

1) If mortgage was executed before April 27, 2016

§ 846.10(2)

a. 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations, when mortgagor has not agreed to provisions of § 846.101(1) (waiver of deficiency)

- 12 months:

— Plaintiff has right to seek deficiency

— Plaintiff has right to seek appointment of receiver

§ 846.101(1)

- 6 months:

§ 846.101(2)
Glover v Marine Bank
117 Wis. 2d 684 (1984)

— Deficiency waived

— Mortgagor is entitled to possession, rents, and profits

— No receiver permitted

Harbor Credit Union v Samp
2011 WI App 40, ¶¶ 3, 21
332 Wis. 2d 214

— Money judgment against mortgagor on second mortgage note is not deficiency judgment precluding accelerated redemption period in foreclosure of first mortgage when plaintiff/foreclosing entity has waived right to deficiency judgment

§ 846.103

b. Commercial property and residential rental properties, non-owner-occupied

Burke v ELC Investors
110 Wis. 2d 406, 411–12
(Ct. App. 1982)

- 6 months

— Seeking deficiency

— Plaintiff has right to seek appointment of a receiver

- 3 months

— Mortgagor is entitled to possession, rents, and profits

— No receiver permitted

Bank Mut v SJ Boyer Constr, Inc
2010 WI 74, ¶ 3
326 Wis. 2d 521

— Plaintiff waives right to a deficiency judgment against mortgagor, but plaintiff retains right to obtain a money judgment against a guarantor of payment, even though plaintiff must waive deficiency from mortgagor

Harbor Credit Union v Samp
2011 WI App 40, ¶¶ 3, 21
332 Wis. 2d 214

- Money judgment against mortgagor on second mortgage note is not deficiency judgment precluding accelerated redemption period in a foreclosure of first mortgage when plaintiff/foreclosing entity has waived right to deficiency judgment

§ 846.102

c. Abandoned property

- 5 weeks

Bank of Sun Prairie v Marshall Dev Corp
2001 WI App 64
242 Wis. 2d 355

- Plaintiff has right to seek deficiency
- Plaintiff has right to seek receiver
- Ct must make an affirmative finding upon proper evidence that mortgaged premises have been abandoned
- Abandoned means the relinquishment of possession or control of the premises whether or not the mortgagor or mortgagor's assigns have relinquished equity and title
- Parties to foreclosure, a representative of city, town, village, or Cty where premises located may give evidence regarding abandonment
- Ct shall take into consideration totality of circumstances, including:
  - — Boarded, closed, or damaged windows or doors
  - — Missing, unhinged, or continuously unlocked doors
  - — Terminated utility accounts
  - — Accumulation of trash or debris
  - — At least 2 reports to law enforcement of trespassing, vandalism, or other illegal acts committed on the premises

— Conditions that make the premises unsafe or unsanitary or that make the premises in imminent danger of becoming unsafe or unsanitary

2015 Wis Act 376
(eff Apr 27, 2016)

2) If mortgage was executed April 27, 2016, or later

§ 846.10(2)

a. 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations, when mortgagor has not agreed to provisions of § 846.101(1)

- 6 months, but 8 months if upon motion before judgment is entered, if Ct finds mortgagor is attempting in good faith to sell the premises and has a listing contract with a licensed real estate broker under Ch 452 to sell the premises:

— Plaintiff has right to seek deficiency

— Plaintiff has right to seek appointment of receiver

§ 846.101

- 3 months, but 5 months if upon motion before judgment is entered, if Ct finds mortgagor is attempting in good faith to sell the premises and has a listing contract with a licensed real estate broker under Ch 452 to sell the premises

— Deficiency waived

— Mortgagor is entitled to possession, rents, and profits

— No receiver permitted

Harbor Credit Union v Samp
2011 WI App 40, ¶¶ 3, 21
332 Wis. 2d 214

— Money judgment against mortgagor on second mortgage note is not deficiency judgment precluding accelerated redemption period in foreclosure of the first mortgage when plaintiff/foreclosing entity has waived right to deficiency judgment

§ 846.103

b. Commercial property and residential rental properties, non-owner -occupied

- No changes—see **Sec. 1.E.**1)b. above

§ 846.102

c. Abandoned property

- 5 weeks. But see para. 3) below

§ 846.102
Committee Comment

3) Abandoned property when foreclosure action **commenced after April 27, 2016**

2015 Wis Act 376, § 10

Note: Time limits for abandoned property are governed by when the foreclosure action was commenced, not when mortgage was executed.

a. Upon motion of plaintiff or the city, town, village, or Cty where premises located, if the Ct makes an affirmative finding that premises have been abandoned by mortgagor or mortgagor's assigns, judgment shall be entered as described below

Note: The mortgagor cannot bring a motion under § 846.102 for property to be declared abandoned.

b. Parties to foreclosure, a representative of city, town, village, or Cty where premises located may give evidence regarding abandonment

c. Abandonment means the relinquishment of possession or control of the mortgaged premises whether or not the mortgagor or mortgagor's assigns have relinquished equity and title

d. Ct shall take into consideration totality of circumstances, including:

- Boarded, closed, or damaged windows or doors
- Missing, unhinged, or continuously unlocked doors
- Terminated utility accounts
- Accumulation of trash or debris
- At least 2 reports to law enforcement of trespassing, vandalism, or other illegal acts committed on the premises
- Conditions that make the premises unsafe or unsanitary or that make the premises in imminent danger of becoming unsafe or unsanitary

e. Judgment shall be entered pursuant to § 846.10, except plaintiff shall, no later than 12 months from date judgment is entered, do one of the following:

- Hold a sale any time after the expiration of 5 weeks from date when judgment entered and have sale confirmed

- Release or satisfy the mortgage lien and vacate the judgment of foreclosure. If plaintiff presents evidence that mortgage lien has been released or satisfied and requests that judgment of foreclosure be vacated, the Ct shall vacate the judgment of foreclosure with prejudice

f. If, 12 months after the date judgment is entered, plaintiff has not complied under para. e. above, then any party to the action or town, village, or Cty where premises located, may petition the Ct for an order compelling a sale of the premises

4) To redeem:

Sec State Bank v Sechen
2005 WI App 253, ¶ 8
288 Wis. 2d 168
M&I Marshall & Ilsley Bank v Kazim Inv, Inc
2004 WI App 13, ¶ 9
269 Wis. 2d 479

a. Mortgagor must make full payment of judgment before confirmation of foreclosure sale, plus interest, allowable costs, and advances, postjudgment

§ 846.13
Harbor Credit Union v Samp
2011 WI App 40, ¶ 49
332 Wis. 2d 214

b. Mortgagor must pay Clerk of Ct or plaintiff/foreclosing entity directly

Harbor Credit Union v Samp
2011 WI App 40, ¶ 41
332 Wis. 2d 214

c. Right to redeem expires on confirmation of sale, and title vests in purchaser as result of confirmation

Harbor Credit Union v Samp
2011 WI App 40, ¶ 57
332 Wis. 2d 214

- Ct could reasonably exercise its discretion to adjourn a confirmation hearing to allow mortgagor additional time to redeem

- However, it would not be a misuse of discretion to deny such a request

JP Morgan Chase Bank, NA v Green
2008 WI App 78, ¶¶ 14–15, 311 Wis. 2d 715

d. Junior lienholders do not have redemption rights under § 846.13

§ 846.15
JP Morgan Chase Bank, NA v Green
2008 WI App 78, ¶¶ 16–20, 311 Wis. 2d 715

- However, junior lienholder may acquire plaintiff's rights

- Junior lienholder may at any time before sheriff sale pay the Clerk of Ct or the plaintiff or plaintiff's assignee the amount of judgment, taxes, interest, and costs, and costs subsequent to judgment and shall thereupon be subrogated to all rights of the plaintiff under the judgment

F. Reasonable Atty fees

§ 814.02(2)

1) Contract for payment of Atty fees and costs governs unless inequitable or unjust

§ 814.045

2) Factors to consider—*See* **Damages**, **CV 22**, **Sec. 1.D.**

§ 428.103(1)(e)2.

3) On first lien real estate loans under $25,000, maximum fee is 5% of amount adjudged due creditor

Harvest Sav Bank
v ROI Invs
209 Wis. 2d 586, 597
(Ct. App. 1997)
Fellenz v Gonring
113 Wis. 2d 228, 231
(Ct. App. 1983)

4) 5% of amount owed by mortgagor, as expressly approved in § 428.103(1)(e)2., is benchmark standard of reasonableness, which may be adjusted as facts determine

5) Wisconsin Consumer Act—Atty fees

§ 422.411(2)(b)

a. Foreclosures of residential property first mortgages

- Mortgagor is only liable for fees of 5% of amount of judgment

- Mortgagor is liable for $100, if no judgment entered and dispute settled before judgment

§ 422.411(1)

b. In all other foreclosure actions subject to the Wisconsin Consumer Act, no contractual fee is permitted in judgment

§ 814.02(2)
§ 814.04(2)

c. However, since foreclosures are equitable actions, costs may be allowed in discretion of Ct, not exceeding $100, plus disbursements

Nationstar Mortg LLC
v Stafsholt
2018 WI 21, ¶ 3
380 Wis. 2d 284

6) Because foreclosures are equitable actions, a Ct may award Atty fees to a mortgagor as an equitable remedy in exceptional cases

G. Findings of fact

1) Ct has jurisdiction over parties and property being foreclosed

2) No proceedings have been had at law or otherwise for recovery of sums secured by the note and mortgage

3) Due notice of pendency of present action, by *lis pendens*, recorded in office of Register of Deeds

   More than 20 days have elapsed since filing

4) Allegations of complaint are proven to be true and correct

5) Real estate involved is either

   a. Homestead of Def(s)

   - A single-family residence on less than 20 acres of land, and
   - Cannot be sold in parcels without injury to parties

   b. Or, homestead of Def(s) and other parcels

§ 846.10(1)

   - Other parcels can be first sold, before the homestead, and
   - Several parcels to be offered for sale separately; then entire mortgaged premises to be offered for sale as a whole; method of sale bringing highest price to prevail

6) There is now unpaid on the mortgage note and mortgage the sum of $_____, plus interest to date of $_____, plus the additional sum of $_____, Atty fees, which I find reasonable and the further sum of $_____ representing costs and disbursements to date in the action, for a total sum due of $_____

7) Plaintiff (has) (has not) waived right to deficiency judgment

H. Judgment of foreclosure and sale

1) Plaintiff is entitled to judgment of foreclosure and sale in the usual form, subject to the right of the Def(s) to redeem within ____ (*months*) (*weeks*) from the date of the docketing of this judgment as provided in § _____ (cite statute governing period of redemption. *See supra* **Sec. 1.E.**)

2) Summons and complaint were duly and personally served upon all Def(s) as evidenced by return of service attached to original pleadings on file, or

Substituted service by advertisement with publication and mailing of summons, as provided by § 801.11, complied with by plaintiff, as shown by affidavit of attempted service, and proof of publication on file

3) Mortgaged premises may be sold as a whole (or in parcels)

§ 815.31(2)

4) Sale of said premises shall be conducted by Sheriff of this Cty, with notice of such sale to be made by posting and publication as provided by law, publication to be in the _____, a newspaper of this Cty, for three (3) successive weeks before date of sale

5) Def(s) and all persons claiming under them, after filing of notice of pendency of this action, are to be forever barred and foreclosed of any right, title, or interest, and equity of redemption in the mortgaged premises so sold

6) Premises in question are (are not) the homestead of the mortgagor Def(s)

Geneva Nat'l Cmty Ass'n v Friedman
228 Wis. 2d 572, 590
(Ct. App. 1999)

When evidence establishes property not a homestead, judgment need not state property is not homestead

7) Deficiency judgment provision

a. Plaintiff is entitled to seek a deficiency judgment against mortgagor Def(s) if proceeds of Sheriff's sale are insufficient to pay total judgment herein granted, or

b. Pursuant to plaintiff's election to foreclose under § 846.101 (or § 846.103(2)), plaintiff has waived right to a deficiency judgment

8) Plaintiff entitled to recover from the Def(s) the sum of $_____ principal; the further sum of $_____ interest to date; the further sum of $_____ Atty fees, which sum I find to be reasonable; and the further sum of $_____ representing costs and disbursements to date in the action; for a total sum due the plaintiff of $_____

Horicon St Bank v Kant Lumber Co
165 Wis. 2d 543
(Ct. App. 1991)

9) All sums advanced by plaintiff for insurance, necessary repairs, and taxes not included in this judgment, may be added to the judgment by order at any time after entry, and costs and disbursements, together with reasonable Atty fees of plaintiff, incurred by reason of Sheriff's sale, if held, shall be added to the judgment on motion of plaintiff, at confirmation hearing for sale. But see Committee Comment at **Sec. 1.C.**2)b., *supra*

Commercial Mortg & Fin Co v Clerk of Cir Ct,

2004 WI App 204, ¶ 19,
276 Wis. 2d 846

10) Since foreclosure judgment does not direct or order payment of money, it is not eligible for docketing under § 806.10(1)

I. Sheriff's Sale

1) Abandoned Property

a. If foreclosure action was commenced before April 27, 2016

Bank of NY Mellon
v Carson
2015 WI 15
361 Wis. 2d 23

- When the Ct determines that a property is abandoned, § 846.102 authorizes the Ct to order a mortgagee to bring the property to sheriff sale after the redemption period

Bank of NY Mellon
v Carson
2015 WI 15
361 Wis. 2d 23

- "Shall" in this statute is mandatory, not directory

Bank of NY Mellon
v Carson
2015 WI 15
361 Wis. 2d 23

- Ct shall order the property be sold within a reasonable time after the 5-week redemption period

Bank of NY Mellon
v Carson
2015 WI 15
361 Wis. 2d 23

- Ct's determination of what constitutes a reasonable time should be based on the totality of the circumstances in each case

2015 Wis Act 376

b. If foreclosure action was commenced April 27, 2016, or later

2015 Wis Act 376, § 10
Committee Comment

Note: Time limits for abandoned property are governed by when the foreclosure action was commenced, not when mortgage was executed.

§ 846.102(3)(a)

- Within 12 months from date judgment entered, mortgagee must do one of the following:

— Hold a sale of mortgaged premises and have the sale confirmed. Any sale may be held any time after the expiration of 5 weeks from the date judgment is entered

— Release or satisfy the mortgage lien and vacate the judgment of foreclosure. If the plaintiff presents evidence the mortgage lien has been released or satisfied and requests that the judgment be vacated, the Ct shall vacate the judgment with prejudice

§ 846.102(3)(b)

- If plaintiff has not complied with § 846.102(3)(a), then any party to the action, city, town, village, or Cty where the premises are located may petition the Ct for an order compelling a sale of the premises

2) Sheriff's sale under § 846.101(2) and § 846.103(2)

Bank of Am, NA v Prissel
2015 WI App 10
359 Wis. 2d 561

a. "Shall" in these statutes is directory, not mandatory

Bank of Am, NA v Prissel
2015 WI App 10
359 Wis. 2d 561

b. These statutes describe a particular process should a sheriff's sale actually occur; they do not require that sheriff's sale actually occur

Bank of Am, NA v Prissel
2015 WI App 10
359 Wis. 2d 561

c. *Bank of NY Mellon v Carson* is distinguished

Bank of Am, NA v Prissel
2015 WI App 10
359 Wis. 2d 561

d. "Shall" in § 846.101(2) is directory, not mandatory regarding publishing notice of sheriff sale during borrower's period of redemption

e. Mortgagee is permitted, but is not required, to publish notices of foreclosure sale during the borrower's redemption periods

J. Notice of Sheriff's sale

1) If mortgage was executed before April 27, 2016

§ 846.10

a. 12-month redemption: 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations when mortgagor has not agreed to provisions of § 846.101(1) (deficiency)

- Notice may be given within the 12-month period, except

- First printing of notice shall not be made less than 10 months after judgment is entered

- Notice of sale of farm shall not be made or advertised until 1 year after judgment entered

§ 846.101

b. 6-month redemption: 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations when mortgagor has not agreed to provisions of § 846.101(1) (waive deficiency)

- Notice may be given within the 6-month period, except
- First printing of notice shall not be made less than 4 months after judgment is entered

§ 846.103

c. 6-month redemption: Commercial property and residential rental properties, non-owner-occupied (deficiency)

- Notice may be given within the 6-month period, except
- First printing of notice shall not be made less than 4 months after judgment is entered

d. 3-month redemption: Commercial property and residential properties, non-owner-occupied (waive deficiency)

- Notice may be given within the 3-month period, except
- First printing of notice shall not be made less than 1 month after judgment is entered

§ 846.102 (2013–14)

e. 5-week redemption: abandoned property

2015 Wis Act 376, § 10
(initial applicability)

- If foreclosure was commenced before April 27, 2016

§ 846.102(1) (2013–14)

- Notice may commence when judgment entered

Committee Comment

Note: Time limits for abandoned property are governed by when the foreclosure action was commenced not when the mortgage was executed.

2) If mortgage was executed April 27, 2016, or later

§ 846.10
2015 Wis Act 376
(eff Apr 27, 2016)

a. 6-month redemption: 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations when mortgagor has not agreed to provisions of § 846.101(1) (deficiency)

- Notice may be given within the 6-month period, except

- First printing of notice shall not be made less than 4 months after judgment is entered

- Notice of sale of farm shall not be made or advertised until 6 months after judgment entered

§ 846.10

b. 8-month redemption: 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations, when mortgagor has not agreed to provisions of § 846.101(1) (deficiency)

- Ct finds mortgagor is in good faith attempting to sell the premises and entered into a listing contract with a licensed real estate broker under Ch 452

- Notice may be given within the 8-month period, except

- First printing of notice shall not be made less than 6 months after judgment is entered, and

- Notice of sale of farm shall not be made or advertised until 8 months after judgment entered

§ 846.101

c. 3-month redemption: 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations, when mortgagor has not agreed to provisions of § 846.101(1) (waive deficiency)

- Notice may be given within the 3-month period, except

- First printing of notice shall not be made less than 1 month after judgment is entered

§ 846.101

d. 5-month redemption: 1- to 4-family residences that are owner-occupied at commencement of action, farms, churches, and tax-exempt charitable organizations, when mortgagor has not agreed to provisions of § 846.101(1) (waive deficiency)

- Ct finds mortgagor is in good faith attempting to sell the premises and entered into a listing contract with a licensed real estate broker under Ch 452

- Notice may be given within the 5-month period, except

- First printing of notice shall not be made less than 3 months after judgment is entered

§ 846.103

e. 6-month redemption: Commercial property and residential rental properties, non-owner-occupied (deficiency)

- Notice may be given within the 6-month period, except

- First printing of notice shall not be made less than 4 months after judgment is entered

§ 846.103

f. 3-month redemption: Commercial property and residential rental properties, non-owner-occupied (waive deficiency)

- Notice may be given within the 3-month period, except

- First printing of notice shall not be made less than 1 month after judgment is entered

§ 846.102
2015 Wis Act 376
(eff Apr 27, 2016)

3) Abandoned property when foreclosure action commenced April 27, 2016, or later

a. 5-week redemption but plaintiff has 12 months to elect options in § 846.102(3)(a), as described above

b. Notice may be given any time within the 12-month period

2015 Wis Act 376, § 10
(initial applicability)
Committee Comment

Note: Time limits for abandoned property are governed by when the foreclosure action was commenced, not when mortgage was executed.

K. Confirmation of sale

JP Morgan Chase Bank, NA v Green
2008 WI App 78, ¶¶ 21–32, 311 Wis. 2d 715

1) Either plaintiff/foreclosing entity or purchaser may apply for confirmation

JP Morgan Chase Bank, NA v Green
2008 WI App 78, ¶ 11, 311 Wis. 2d 715

2) Decision to confirm sale is discretionary, but Ct must apply correct legal standard to relevant facts and reach a reasonable outcome

Shuput v Lauer
109 Wis. 2d 164, 171–72 (1982)

3) Issues are confined to sale, confirmation of sale, computation of deficiency, and entry of deficiency judgment

a. Legal obligations of the parties are determined in the Judgment of Foreclosure and Sale

Cmty Nat'l Bank v O'Neill 157 Wis. 2d 244 (Ct. App. 1990)

b. Sale may be confirmed even when appeal from foreclosure judgment still pending

4) Test—Did the property sell for fair value?

First Wis Nat'l Bank v KSW Invs 71 Wis. 2d 359 (1976)

a. If price bid at Sheriff's sale is so grossly inadequate as to shock conscience of Ct, price is inadequate as a matter of law

Kremer v Rule 216 Wis. 331, 339 (1934)

b. Ct should consider fair value (real value) of mortgaged premises under all circumstances of case

Bank of NY v Mills 2004 WI App 60, ¶ 15 270 Wis. 2d 790

- If no deficiency judgment is sought, sale is presumed to be for fair value

Bank of NY v Mills 2004 WI App 60, ¶ 18 270 Wis. 2d 790

- Factors that may be considered include time the property is offered for sale before foreclosure sale, any offers received before foreclosure sale, any appraisals, whether any offers were made that matched appraisals, and property tax assessment

Surring St Bank v Giese 210 Wis. 489, 492–93 (1933)
Bank of New York v Mills 2004 WI App 60 ¶¶ 10, 19 270 Wis. 2d 790

- Fair value is not fair market value as that term is generally understood; market value is based on more favorable economic condition than distress (foreclosure) sale

Kremer v Rule 216 Wis. 331, 339 (1934)

- "Real value" is price person willing and able to buy property would reasonably pay for it, not for purposes of speculation, but for use to which it has been or reasonably may be put

§ 846.16(2m)(ae)
First Wis Nat'l Bank v KSW Invs 71 Wis. 2d 359 (1976)

c. When property is sold for less than the amount due on mortgage, Ct should find

- What fair value of premises is

- That fair value has been credited toward mortgage debt

First Wis Nat'l Bank v KSW Invs
71 Wis. 2d 359, 366 (1975)
Citizens Bank v Rose
59 Wis. 2d 385, 388 (1973)

5) If the amount bid is substantially inadequate under above test, Ct may do any of following

a. Decline to confirm sale and order resale

b. Order a resale, fixing minimum upset price which must be bid if sale to be confirmed

c. Establish fair value of property after hearing and require that amount to be credited against debt as condition of confirmation

§ 846.16(2m)(ae)
First Wis Nat'l Bank of Oshkosh v KSW Invs, Inc
71 Wis. 2d 359, 367 (1976)

6) Language in former § 846.165(2) (now § 846.16(2m)(ae)) has been interpreted to mean no more than "such reasonable value as does not shock the conscience of the Ct"

Bank of NY v Mills
2004 WI App 60
270 Wis. 2d 790

a. Even if mortgagee is not seeking a deficiency judgment the statute does not eliminate the requirement that the Ct find "fair value"

Bank of NY v Mills
2004 WI App 60
270 Wis. 2d 790

b. When a creditor seeks a deficiency judgment there is no presumption that the property sold for fair value

Bank of NY v Mills
2004 WI App 60
270 Wis. 2d 790

c. When the mortgagee does not seek a deficiency judgment, there is a presumption that the property sold for fair value

Bank of NY v Mills
2004 WI App 60
270 Wis. 2d 790

d. If the property sells for the amount due plus costs there is a presumption that the bid represents fair value

7) No confirmation of sale or judgment for deficiency to be entered until

a. Finding of fair value made, and

b. Fair value amount credited against total mortgage debt

McFarland St Bank v Sherry
2012 WI App 4, ¶ 21
338 Wis. 2d 462

- Proceeds of foreclosure sale (or fair value of mortgaged property if plaintiff/foreclosing entity is the purchaser) offset amount of money judgment against a guarantor to prevent over-recovery

Horizon Bank, NA v Marshalls Point Retreat LLC
2018 WI 19
380 Wis. 2d 60

- However, Ct may consider the amount of credit applied toward a guaranty separately from the amount of credit applied to the mortgage debt under § 846.165(2) (2015–16) (since renumbered as § 846.16(2m)(ae))

Shuput v Lauer
109 Wis. 2d 164, 172–73
(1982)

8) Upon confirmation of sale, entry of a deficiency judgment is ministerial and clerical, and as a matter of course

9) Surplus

§ 846.10(3)

a. Shall be paid into Ct, pending hearing and order

§ 846.162

b. Any party to the action or person not a party who has a lien on the mortgaged premises may file a claim for the surplus with Clerk of Ct

Kienbaum v Haberny
273 Wis. 413, 417, 421
(1956)

- Claimants need not answer or make appearance in the foreclosure action to claim surplus

- No claim is required to be filed until it appears that surplus actually exists

c. Ct must hold a hearing to determine who has right to the surplus

- 8 business days' notice required to all persons who appeared in the action or filed claims for surplus

- Notice may be by mail to claimant at address listed on claim for surplus

§ 846.17(2m)(as)

10) Writ of assistance may be issued by Ct to purchaser

L. Technical requirements for confirmation of sale

1) Proof of publication

§ 815.31(2)

a. Three consecutive weeks before date of sale by printer's affidavit

§ 815.31(1)

b. Proof of posting in one public place in town or municipality where real estate located, if not in town or municipality where sale is to be held, and, if Cty where real estate is located maintains a website, by posting a notice on the website; also, in one public place in town or municipality where sale to be conducted, and, if Cty where real estate is to be sold maintains a website, by posting a notice on the website at least three weeks before sale

§ 846.16

2) Sheriff's report of sale and Sheriff's deed on file

§ 846.165

3) Notice of application for confirmation of sale given to all persons who have appeared, at least 5 business days before hearing

Wells Fargo Bank, NA
v Biba
2010 WI App 140, ¶¶ 9–11, 329 Wis. 2d 787

a. Notice not required for parties not appearing in the action

GMAC Mortg Corp
v Gisvold
215 Wis. 2d 459 (1998)

b. Purchaser entitled to notice of the confirmation hearing

Wells Fargo Bank, NA
v Biba
2010 WI App 140, ¶ 13
329 Wis. 2d 787

4) Hearing required for confirmation of sale only if notice was required to be given to a party appearing in the action

5) Findings at hearing on confirmation of sale

a. Sale conducted according to law and Sheriff's report of sale on file

b. Amount due plaintiff on judgment at time of sale was $_____

c. Since date of judgment, plaintiff has paid taxes, insurance … (additions to the judgment here) … and that such additions are added to the judgment and make the total judgment due on this date to be in the sum of $_____

d. That (name) was the purchaser at sale and highest and best bid received by the Sheriff was $_____

§ 846.16(2m)(b)

6) Purchaser must pay balance of purchase price within 10 business days after confirmation of sale

§ 846.16(4)(a)

a. If purchaser fails to do so, down payment is forfeited

§ 846.16(4)(a)

b. Amount forfeited paid to parties entitled to proceeds and resale ordered

GMAC Mortg Corp v Gisvold 215 Wis. 2d 459 (1998)

c. Ct has no authority to waive or extend the 10-day period

- 10-day period does not begin to run until purchaser receives proper notice

First Banking Ctr v Twelfth Street Investors, LLC 2011 WI App 103 336 Wis. 2d 150

- When an appeal prevents purchaser from paying remaining purchase price within 10 days after confirmation of sheriff's sale, purchaser is entitled to notice from Circuit Ct after remand as to when 10-day period begins to run

Carolina Builders Corp v Dietzman 2007 WI App 201, ¶¶ 28, 39–41, 304 Wis. 2d 773

M. Effect of failure to join junior lienholders and remedies, see *Carolina Builders Corp v. Dietzman*

N. Receiver

§ 813.16(1)

1) May be appointed by motion at commencement of action

2) Grounds for appointment

a. Rents and profits in danger of being lost or materially impaired

b. Prevention of waste

Dick & Reuteman Co v Jem Realty Co 225 Wis. 428 (1934)

- Waste includes default in payment of interest, taxes, and insurance, including the likelihood of future defaults

§ 813.16(7)

3) If plaintiff is savings and loan association or savings bank supervised by Division of Banking or corporation supervised by FDIC, Ct shall, unless objected to by Def, appoint officer of that corporation to serve as receiver without compensation

2. Land Contract Foreclosure

A. Jurisdiction

§ 801.07(2)
§ 753.03

1) Ct may exercise jurisdiction *in rem* or *quasi in rem* when action is to foreclose a mortgage claim upon real estate within Wis

2) Proceedings are equitable in nature

Neff v Barber
165 Wis. 503 (1917)

a. Therefore, no right to jury trial

Norwest Bank Wis
v Plourde
185 Wis. 2d 377
(Ct. App. 1994)

b. If Def asserts counterclaims, however, jury trial available if

Green Spring Farms
v Spring Green Farms
172 Wis. 2d 28
(Ct. App. 1992)

- Issue preclusion (collateral estoppel) would bar Def from asserting claims in a separate action, or

ABCG Enters v
First Bank SE
178 Wis. 2d 370
(Ct. App. 1993)
aff'd, 184 Wis. 2d 465
(1994)

- If facts, events or transactions are same and claim preclusion (res judicata) would bar subsequent action

§ 846.30

c. Only Wis statute that deals directly with foreclosure of land contracts is § 846.30

Committee Comment

d. See Ch 840 generally for guidance

§ 840.10(1)

3) *Lis pendens* must be filed

Republic Bank of
Chicago v Lichosyt
2007 WI App 150,
¶¶ 18–19
303 Wis. 2d 474

B. Remedies available to vendor

Kallenbach v
Lake Publ'ns, Inc
30 Wis. 2d 647, 651
(1966)

1) Specific performance (foreclosure and sale)

a. Election to affirm contract

b. Acceleration clause must be in contract

c. Prove default, seek judicial sale, and recover principal, interest, costs, Atty fees from sale

- In event sale exceeds judgment, Def retains surplus
- On deficiency, plaintiff seeks judgment for deficiency

2) Strict foreclosure

Westfair Corp v Kuelz
90 Wis. 2d 631, 636
(Ct. App. 1979)

a. Terminates existing rights of purchaser and persons claiming under purchaser

Coraci v Noack
61 Wis. 2d 183, 190
(1973)

b. Confirms legal title in vendor by foreclosing purchaser of whatever equitable interest purchaser has in property

Fellenz v Gonring
113 Wis. 2d 228, 230–31
(Ct. App. 1983)

c. Vendor may also recover reasonable Atty fees and costs from vendee personally

Kallenbach v
Lake Publ'ns, Inc
30 Wis. 2d 647, 651
(1966)

3) Suit on debt

a. Money judgment sought on contract in amount of principal due after default

b. Does not look to property for security or sale

C. Period of redemption

Westfair Corp v Kuelz
90 Wis. 2d 631, 636
(1979)

1) Length of redemption period is within discretion of Ct

§ 846.30

a. For strict foreclosure, the minimum redemption period is 7 working days from the date of the judgment hearing or, if there is no hearing, from the date of entry of the judgment order

Republic Bank of
Chicago v Lichosyt

2007 WI App 150, ¶ 40
303 Wis. 2d 474

b. Minimum redemption period may be waived by vendee

Republic Bank of Chicago v Lichosyt
2007 WI App 150,
¶¶ 41–49
303 Wis. 2d 474

c. Junior lienholders do not have right to redeem

Kallenbach v Lake Publ'ns, Inc
30 Wis. 2d 647, 657
(1966)

2) Factors to consider

a. Ability of Def to redeem

b. State of solvency of Def

c. Value of land

d. Likelihood of refinancing

e. Size of Def's equity

f. Length of default

g. Materiality of time in the contract

3) Ct balances equities of parties in setting time for redemption

a. If equities heavily favor Def, Def to be given all reasonable opportunity to pay up the contract obligation to preserve Def's equity

b. However, plaintiff should not be deprived of land for any considerable length of time, unless there appears to be reasonable possibility of redemption

Republic Bank of Chicago v Lichosyt
2007 WI App 150, ¶ 25
303 Wis. 2d 474

c. Vendor and vendee equities are to be addressed, not equities of lienholders

D. Evidence required at hearing

1) Identification and proof of execution of land contract

2) Proof that *lis pendens* was recorded at least 20 days before hearing

3) Acts of principal Def constituting default

4) Amount due for principal and interest

5) No other action pending to collect amount due under the land contract

E. Judge to determine

1) Size of parcel, if homestead and judicial sale sought

Determine if lands other than homestead can be sold first to satisfy judgment

2) Value of the property

Kallenbach v
Lake Publ'ns Inc
30 Wis. 2d 647, 657
(1966)

3) Ability of principal Def to redeem and likelihood of principal Def(s)' ability to refinance

4) Equity of principal Def

F. Reasonable Atty fees

§ 814.045

1) Factors to consider—*See* **CV 22**, **Damages**, **Sec. 1.D.**

Fellenz v Gonring
113 Wis. 2d 228, 231
(Ct. App. 1983)

2) 5% of amount owed by vendee is benchmark standard of reasonableness, which may be adjusted as facts warrant

G. Action for specific performance (foreclosure and sale)

1) Findings of fact

a. Ct has jurisdiction over parties and property subject to action

b. No proceedings have been had at law or otherwise for recovery of sums secured by contract

c. *Lis pendens* was duly recorded and filed at least 20 days before hearing

d. Allegations of complaint are proven to be true

e. Real estate involved is (is not) the homestead of the Def(s) and can (cannot) be sold in parcels

f. There is now due and unpaid on the land contract the principal sum of $_____, plus interest to date of $_____, plus the further sum of $_____ Atty fees, which sum I find reasonable, and the further sum of $_____, representing costs and disbursements to date, for a total due of $_____

g. A period of redemption to (date) is reasonable under all of the circumstances

2) Conclusions of law

a. Plaintiff is entitled to a judgment of specific performance of the land contract

b. Def shall have a period of redemption to (date) in which to pay the entire amount found to be due herein to Clerk of Ct

c. Upon failure of Def to pay amount due within specified time, plaintiff entitled to a Sheriff's sale, which shall be conducted by the Sheriff of this Cty

§ 815.31(2)

- Notice of such sale to be made by posting and publishing in Cty newspaper for 3 successive weeks before date of sale

d. Def(s) and all persons claiming under them, after filing of notice of pendency of this action, are to be forever barred and foreclosed of any right, title or interest and equity of redemption in premises so sold

e. If premises are sold and proceeds are insufficient to pay the amount to the plaintiff, plaintiff may apply to Ct for deficiency judgment against Def personally

f. Plaintiff is entitled to recover from Def the sum of $_____, the further sum of $_____, interest to date; the further sum of $_____ Atty fees; and the further sum of $_____ representing costs and disbursements to date in the action; for a total sum due the plaintiff of $_____

3) Confirmation of sale

a. Test is same as for foreclosure of mortgage

b. See **Secs. 1.K.** and **1.L.**, *supra*

H. Action for strict foreclosure

1) Findings of fact

a. Ct has jurisdiction over parties and property being foreclosed in this action

b. No proceeding has been had at law or otherwise for recovery of sums secured by the land contract

c. Due notice of pendency of this action by filing of *lis pendens* in Office of the Register of Deeds more than 20 days before hearing

d. There is now due and unpaid on the land contract the principal sum of $_____, plus interest to date of $_____, plus the further sum of $_____ Atty fees, which sum I find reasonable, and the further sum of $_____, representing costs and disbursements to date, for a total due of $_____

e. A period of redemption to (date) is reasonable under all of the circumstances

2) Conclusions of law

a. Def(s) are now in default under terms of the land contract

b. Plaintiff has declared the contract to be at an end and Def(s) are entitled to a period of redemption to (date)

§ 846.30

3) Judgment of strict foreclosure setting a redemption period of at least 7 working days from date of judgment hearing or, if no hearing, from date of entry of judgment order

Republic Bank of Chicago v Lichosyt
2007 WI App 150, ¶ 40
303 Wis. 2d 474

a. Redemption period may be waived

Republic Bank of Chicago v Lichosyt
2007 WI App 150, ¶ 49
303 Wis. 2d 474

b. Judgment lienholders do not have right to redeem

§ 846.30

4) Upon failure of Def(s) to redeem within period established, Ct shall enter an order confirming that no redemption has occurred and making the judgment of strict foreclosure absolute

Steiner v
Wis Am Mut Ins Co
2005 WI 72
281 Wis. 2d 395

5) Under § 846.30, equitable title remains with land contract vendee until Ct enters final order, following redemption period for strict foreclosure, confirming land contract vendee's nonredemption

Hackmann v Behm
207 Wis. 2d 437
(Ct. App. 1996)

6) Judgment of strict foreclosure determines the legal rights and interests. Proceedings after judgment is entered limited to whether property is redeemed

I. Technical requirements for execution of judicial sale and writ of assistance

§ 815.03

1) Judicial sale in accordance with Ch 815 (Executions)

2) Requirements same as those for mortgage foreclosure

See **Secs. 1.K.** and **1.L.**, *supra*

CV 40: SETTLEMENTS: STRUCTURED, MINORS, AND INCOMPETENT PERSONS

§ 895.65–.70

1. Structured Settlements

A. Applies to the transfer of all structured settlement annuity payments both for minors and adults

B. Definitions

§ 895.65(1)

1) "Annuity issuer" means an insurer that has issued a contract to fund structured settlement

§ 895.65(9)

2) "Payee" means an individual who is receiving tax-free payments under a structured settlement and proposes to make a transfer of the payment rights

§ 895.65(19)

3) "Transfer agreement" means the agreement providing for a transfer of structured settlement payment rights

§ 895.65(21)

4) "Transferee" means a party acquiring or proposing to acquire structured settlement payment rights through a transfer

§ 895.66

C. Not less than five business days before a payee signs a transfer agreement, the transferee must provide disclosures to the payee

§ 895.67

D. All transfers of structured settlement payment rights must be approved by the Ct and the Ct must make express findings that all of the following are true:

§ 895.67(1)(a)

1) The transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents

§ 895.67(1)(b)

2) The payee has been advised in writing by the transferee to seek independent professional advice regarding the transfer and has either received such advice or knowingly waived in writing the opportunity to receive such advice

§ 895.67(1)(c)

3) The transfer does not contravene any applicable statute or order of any Ct or other governmental authority

E. The Ct may consider any of the following factors when determining whether the proposed transfer is in the best interest of the payee:

§ 895.67(2)(a)

1) Whether the payee understands the financial ramifications of the transfer agreement and is entering into the agreement voluntarily

§ 895.67(2)(b)

2) The financial terms of the transfer agreement

§ 895.67(2)(c)

3) Whether the payee is delinquent in the payment of taxes in this state or any payments required to be made pursuant to a restitution order in a criminal or juvenile delinquency proceeding, or pursuant to a child support order

§ 895.67(2)(d)

4) Any other considerations the Ct deems appropriate

5) If the payee is a minor or adjudicated incompetent, the Ct must consider additional factors:

§ 895.67(3)(a)

a. The physical and mental health of the payee

§ 895.67(3)(b)

b. The payee's overall financial situation

F. Procedural Requirements

§ 895.69(2)

1) A hearing must be held

§ 895.69(2)

2) The payee must attend the hearing in person unless the Ct determines that audiovisual technology is appropriate or good cause exists for the payee not to appear

§ 895.69(1)

3) The hearing must be held in the Cty in which the payee is domiciled at the time the transfer agreement is signed, or if the payee is not domiciled in this state, then in the Cty where the structured settlement obligor or the annuity issuer maintains its principal place of business or in any Ct that approved the structured settlement agreement

§ 895.69(3)

4) At least 20 days prior to the hearing, the transferee shall file with the Ct and serve on all interested parties, a notice of the proposed transfer and petition including:

§ 895.69(3)(a)

a. A copy of the transferee's petition

§ 895.69(3)(b)

b. A copy of the transfer agreement

§ 895.69(3)(c)

c. A copy of the disclosure statement required under § 895.66 (see statute for specifics)

§ 895.69(3)(d)

d. A listing of each of the payee's dependents, together with each dependent's age

§ 895.69(3)(e)

e. Notification that any interested party is entitled to support, oppose, or otherwise respond to the petition either in person or by counsel by submitting written comments to the Ct or by participating in the hearing

§ 895.69(3)(f)

f. Notification of the time and place of the hearing and notification of the manner in which and time by which written responses to the petition must be filed

§ 895.69(3)(g)

g. An affidavit from the payee stating whether the payee is delinquent in the payment of taxes in this state or in any payments required to be made pursuant to a restitution order in a criminal or juvenile delinquency proceeding or pursuant to a child support order

2. Conditions of Settlement

§ 807.10(1)
§ 803.01(3)(b)6.

A. If action is commenced

1) General guardian may settle

a. Guardian must be represented by Atty

b. Ct in which action pending must approve settlement

2) Or, GAL may settle, subject to approval of Ct in which case is pending

§ 807.10(2)
§ 803.01(3)(b)6.

B. If no action is commenced

1) General guardian may settle

a. Guardian must be represented by Atty, and

b. Ct that appointed guardian must approve settlement

2) Or, GAL may settle, subject to approval by any Ct of record

Kainz v Ingles
2007 WI App 118, ¶ 54
300 Wis. 2d 670

3. Procedure When Competency Raised

A. Order parties to select mutually agreed-upon psychiatrist to conduct examination

B. Appoint GAL if expert finds psychiatric illness and recommends appointment and Ct concludes there are sufficient indications that party needs a GAL

C. Order mediation

D. If GAL seeks authority to settle, hold an adversarial competency hearing with opportunity of party to address the Ct

Kainz v Ingles
2007 WI App 118, ¶ 52
300 Wis. 2d 670

E. Apply three-part competency test

1) Ability to reasonably understand pertinent information

2) Ability to rationally evaluate litigation choices based on that information

3) Ability to rationally communicate with, assist, and direct counsel

F. If party found incompetent, grant GAL authority to settle

G. Conduct a separate settlement hearing

4. Hearing to Approve Settlement

A. Procedure

Recommendation

1) Hearing should be on record

2) Ct makes following findings

   a. Whether liability is questionable or admitted

   b. Nature and extent of injury

   c. Relationship between liability, injury, and amount of settlement

   d. Whether settlement reasonable under circumstances

   e. Reasonableness of Atty fees

   f. Amount of GAL fees, if appropriate

3) Hearing may be conducted by telephone as prescribed in § 807.13

Recommendation

4) Determine fairness of settlement by inquiring of parties on record

§ 807.10(3)
§ 867.03(1g)

B. Approval of award of less than $50,000 to minor, when no general guardian has been appointed

1) Ct orders approval of settlement

2) Ct fixes and allows fees

   a. Atty fees

   b. GAL fees

   c. Expenses of action

3) Ct authorizes disbursement of settlement sum pursuant to § 54.12(1)

   a. Settlement must be paid to register in probate

   b. Settlement can only be disbursed in accordance with Ct order

4) Ct authorizes GAL to finalize settlement

a. To execute releases, and

b. To stipulate dismissal of action on its merits

5. Disbursement of Funds

§ 54.12(1)
§ 807.10(3)
§ 867.03(1g)

A. Settlements under $50,000, when no general guardian has been appointed (Exclusive of interest, costs, and disbursements)

1) Ct must order clerk to pay expenses of action

2) Ct may order balance of award

a. Deposited until Ct authorizes disbursement, in

§ 54.12(1)(a)

- Interest-bearing account in insured bank or other insured financial institution

§ 54.12(1)(a)

b. Invested in U.S. interest-bearing obligations

§ 54.12(1)(b)

c. Paid to parent or to person having actual custody of minor

§ 54.12(1)(c)

d. Paid to minor

§ 54.12(1)(d)

e. Paid to person having actual or legal custody or person providing care and maintenance for individual found incompetent for that individual's benefit

§ 814.61(12)(a)

f. Clerk of Ct paid fee for depositing and disbursing funds

§ 867.03(1g)

B. Settlements over $50,000

§ 54.12(1)

1) Guardianship may be required

§ 54.46(4)

a. Ct may order bond

2) Ct may order payment to guardian of the estate

§ 54.12(3)
§ 54.854–.898

3) Ct may approve use of custodian under Uniform Gifts and Transfers to Minors Act, without guardian, for settlement of any value

6. Wrongful Death Action Settlements

§ 895.04(2)

A. Ct may set aside amount for protection of minor children

1) Substantive conditions

See Ch 770

a. Deceased leaves surviving spouse or surviving domestic partner **and** minor children

Le Fevre v Schrieber
167 Wis. 2d 733 (1992)

- Including nonmarital and posthumously born children

b. And deceased was legally obligated to support such dependents

Ch 655
§ 893.55(4)(d)
Rineck v Johnson
155 Wis. 2d 659 (1990)
Jelinek v St Paul
Fire & Cas Ins Co
182 Wis. 2d 1 (1994)

- Child has separate cause of action for loss of society and companionship under medical malpractice statute

- Applies even when deceased leaves surviving spouse or domestic partner

§ 893.55(4)(f)
Czapinski v
St Francis Hosp
2000 WI 80
236 Wis. 2d 316

c. In medical malpractice cases, recovery subject to limit under § 895.04(4)

2) Procedural conditions

a. Hearing before Ct in which action pending, or

b. Hearing before any Ct of record, if no action pending

§ 895.04(2)

B. Procedure

Recommendation

1) Conduct hearing with notice to all parties

Recommendation

2) Determine jurisdiction authorizing Ct's exercise of discretion

§ 895.04(2)

3) Ct must determine

a. Amount of settlement, if any, to be reserved for protection of minor children

b. Limitations

- Amount reserved to minor children cannot exceed 50% of net settlement amount
- Net settlement amount includes deduction for costs of collection

§ 895.04(2)

4) Ct's determination must consider

a. Amount of settlement involved

b. Parents' duty and responsibility to support minor children

c. Age of minor children

d. Capacity and integrity of surviving spouse or surviving domestic partner

e. Any other facts or information Ct may have or receive

Recommendation

5) Ct should order approval of settlement on record

§ 895.04(2)

6) Ct may protect the minor children's portion of settlement

a. Ct may impress a lien in favor of minor children against settlement, or

b. Ct may otherwise protect minor children's share as circumstances warrant

§ 867.03(1g)

7) Ct may apply § 807.10 if minor child's portion is less than $50,000

§ 895.04(4)

8) Loss of society and companionship raised to $500,000 for deceased minor and $350,000 for deceased adult by 1997 Wis Act 89

7. For Wrongful Death Damages generally, see CV 22, Damages

8. Redacting and Sealing Court Records, see CV 5, Secs. 11 and 12

CV 41: SMALL CLAIMS

1. Small Claims Procedure

A. Chapter

799 procedure exclusive in following

§ 799.01(1)(a)
§ 799.40–.45

1) Eviction actions. *See infra* **Sec. 10**

§ 799.01(1)(am)

2) Return of earnest money actions in certain cases regardless of amount claimed

§ 799.01(1)(b)
61 OAG 88

3) Forfeiture actions

a. Except when different procedures are prescribed in Ch 23, Ch 66, Ch 345, Ch 778, or elsewhere

b. Such different procedures shall apply equally to State, Cty, or municipality, regardless of any limitations contained in those procedures

4) Replevin actions

§ 799.01(1)(c)

a. Under §§ 810.01–810.13, and

b. When value of claimed property does not exceed $10,000

- Except in actions covered by Wis Consumer Act. See **Sec. E.**, *infra*

§ 799.01(1)(cm)

5) Actions concerning arbitration awards regarding purchase of real property, regardless of amount of award

§ 799.01(1)(cr)

6) Third-party complaints, personal-injury claims, and actions based in tort, provided amount claimed is $5,000 or less

§ 799.01(1)(d)

7) Other civil actions when amount claimed is $10,000 or less:

§ 799.01(1)(d)1.

a. Money judgments

§ 799.01(1)(d)2.

b. Attachment or garnishment

- Under Ch 811 and garnishment under subch I of Ch 812
- Not under § 811.09

§ 799.01(1)(d)3.

c. Enforcement of lien on personalty

§ 799.01(2)

d. Recovery of tax

- Permissive use of small claims if action for $10,000 or less including interest and penalties

Reusch v Roob
2000 WI App 76
234 Wis. 2d 270

e. Atty fees awarded pursuant to statute (e.g., § 100.20(5)) not included in small claims limitation under Ch 799

B. Ch

799 procedures not used

§ 799.02

1) When counterclaim or cross-claim beyond small claims limitation of § 799.01

§ 799.21(4)

2) When jury trial demanded

§ 799.03

C.

"Court" means Judge, not Circuit Ct Comm'r

§ 799.04(1)

D. Chs

750–758 and Chs 801–807 apply

RMC Form SC-516

E. Replevin actions covered by Wisconsin Consumer Act

§ 425.205(1)

1) Availability limited to recovery of collateral or goods subject to consumer lease, regardless of value

§ 425.205(1)(e)

2) Action limited

a. Judgment determines only right to possession of the collateral or leased goods

b. Judgment does not bar any subsequent action for damages or deficiency

c. If amount more than limit under § 799.01, deficiency claim must be brought in large claims

3) See **CV 35** for Wisconsin Consumer Act

§ 799.05

2. Initiating Action

§ 799.05(1)
RMC Form SC-500

A. Summons

§ 799.05(2)

1) Must be signed by clerk or Atty

§ 799.05(3)(a)

2) For summons served on resident, must state return date

§ 799.05(3)(b)

a. Not less than 8 nor more than 30 days after issue date, with service not less than 8 days before return date, except in eviction actions

b. For eviction actions, not less than 5 days nor more than 25 days after issue date with service not less than 5 days before return date

Comment
See 1993 Wis Act 80

- Garnishments no longer included in § 799.05(3)(b)

§ 799.05(3)(c)

3) For summons served on nonresident, return date not less than 20 days after issue date

B. Pleadings

§ 799.06(1)

1) All pleadings except initial complaint may be oral

2) Written pleadings required

§ 799.06(1)

a. When required by Circuit Ct rule

b. When Judge or Circuit Ct Comm'r directs in a particular case

§ 799.02(3)

3) Written notice required if counterclaim or cross-complaint beyond small claims limitations filed

C. Representation of parties

§ 799.06(2)

1) Individuals may commence and prosecute an action with or without an Atty

2) Proxies

§ 799.06(2)

a. Full-time member, agent, or authorized employee who is not an Atty may commence and prosecute action on behalf of party

§ 799.06(2)

b. An assignee of any cause of action shall not appear by a full-time authorized employee, unless employee is Atty

c. Applies to individuals, corporations, and other non-individual parties

3. Venue Depends on Nature of Action

§ 799.11(1)(a)

A. Garnishment actions

1) Where garnishee resides, or

2) Where garnishee is found, if not a State resident, or

3) Cty where summons in principal action was issued, or

4) Cty where judgment in principal action entered

§ 799.11(1)(b)
§ 801.50(5m)

B. Claims arising out of consumer credit transaction or consumer transaction

§ 421.401

1) Where customer resides or is personally served

2) Where collateral securing consumer credit transaction located

3) Where customer signed document evidencing obligation under terms of transaction or sought or acquired services

Brunton v
Nuvell Credit Corp
2010 WI 50
325 Wis. 2d 135
Kett v Cmty
Credit Plan, Inc
222 Wis. 2d 117, 129
(Ct. App. 1998)
aff'd, 228 Wis. 2d 1
(1999)

4) If venue not proper in consumer credit transaction, dismiss for lack of jurisdiction

To establish valid venue waiver in consumer credit actions, party claiming waiver must prove that Def knew the place of proper venue and knew that Def had the right to dismissal of case not properly venued

C. Forfeiture actions

§ 799.11(1)(c)

Cty where act occurred

D. Tax collection actions

§ 799.11(1)(d)

Cty where tax levied

E. In all other actions

§ 799.11(1)(e)

Cty specified in § 801.50

F. Rules of construction

§ 799.11(2)

If there are several Defs and venue is based on residence, venue may be in Cty where any one Def resides

§ 799.11(3)
§ 801.50–.53
§ 801.61–.62

G. Remedy for improper venue

1) Transfer action to proper Cty

a. On motion of party

b. On Ct or Ct Comm'r's own motion

Brunton v
Nuvell Credit Corp
2010 WI 50

325 Wis. 2d 135
Kett v Cmty Credit Plan, Inc
222 Wis. 2d 117, 129 (Ct. App. 1998)
aff'd, 228 Wis. 2d 1 (1999)

2) For consumer credit transactions, dismiss for lack of jurisdiction

3) Unless Def appears and waives improper venue

§ 799.12

4. Service of Summons

A. Personal or substituted service per § 801.11

§ 799.12(2), (3)

1) Required except as authorized by Ct rule

§ 799.12(3)

2) If Ct rule authorizes service by mail in eviction actions, must be certified mail with return receipt requested

§ 799.16(3)

B. Posting and mailing in eviction actions

If Def cannot be served with personal or substituted service under § 799.12(1), plaintiff may post notice at least 7 days before return date and mail additional copy to last-known address at least 5 days before return date

C. Publication

§ 799.12(4), (6)

1) Available if Def cannot be served by personal or substituted service under § 801.11 or by mail, if allowed under § 799.12(2)

§ 799.16(1), (2)

2) Available in actions in rem or quasi in rem if Def has not waived defense of lack of jurisdiction over person and if Ct has jurisdiction over property

§ 799.12(6)(b), (c)
§ 985.07

3) Only one insertion required

5. Answers, Counterclaims, Cross-Complaints, and Impleader

A. Answers

§ 799.20(1), (4)

1) Def must respond to complaint on return date, or

§ 799.22(4)

2) If Ct permits by rule, Def may join issue by phone or mail within time rule permits

§ 799.206(3)

3) In eviction, garnishment, and replevin actions, if any party raises valid legal grounds for a contest, Judge must hear. *See infra* Sec. 10

a. Applies to non-wage garnishments only. Comm'rs to hear earnings garnishments under § 812.30 and § 812.38

§ 799.20(4)

b. In residential evictions, trial must be complete within 30 days of the return date unless parties stipulate otherwise or unless action is subject to immediate dismissal

§ 799.02

B. Counterclaims

§ 799.20(2)
§ 799.02

C. Cross-complaints

1) A Def may cross-complain against another Def who has appeared

2) Cross-complaint must be made or filed on the return date or on any adjourned date

§ 803.05

D. Impleader

6. Circuit Court Commissioners

A. Powers

§ 757.69
§ 799.206

1) Conduct the hearings and proceedings prescribed by Ch 799

§ 799.206(2)

2) Grant and enter default judgments

§ 799.24(3)

3) Approve stipulations

§ 799.207(1)(a)

4) Conduct conferences and hearings with parties and Attys on return dates and adjourned dates

Hessenius v Schmidt
102 Wis. 2d 697 (1981)

5) Cannot find frivolousness

B. Decisions of Comm'r

§ 799.207(1)(e)

1) Comm'r must render a decision

a. Orally, at the conclusion of the hearing, or

b. In writing, mailed to each party within 30 days after the hearing

§ 799.207(2)

2) Decisions become final for judgment purposes, if neither party demands a Circuit Ct trial

a. 11 days after hearing, if decision rendered orally, or

b. 16 days after mailing, if written decision rendered

§ 799.207(2)(a)

3) Default judgments have immediate effect

§ 799.207(3)(b)

4) Comm'r must give parties a form and instructions as notice of right to have matter reheard by Ct

§ 799.209

C. Procedure at any trial, hearing, or other proceeding under Ch 799

§ 799.209(1)

1) Ct or Circuit Ct Comm'r to conduct informally

§ 799.209(2)

2) Rules of evidence not applicable except as to relevancy and privilege or to admissibility under § 901.05

§ 799.209(2)
Riese v
Bertch Cabinet Mfg
No. 2011AP2601
2012 WL 3079235
(Wis CA 7/31/2012)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

3) Hearsay is admissible, but an essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence

7. Trial Before Circuit Court

A. Demand for trial de novo

§ 799.207(3)(c)
§ 801.15(1)(b)

1) Time constraints for demand

See Team Prop Mgmt,
LLC v Reiss
No 2016AP2163

2017 WL 2275837
(Wis CA 5/24/2017)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

a. Within 10 days from date of an oral decision, (Saturdays, Sundays, and holidays included in the computation), or

Committee Comment

The Civil Benchbook Committee does not usually cite unpublished opinions, but *Team Property Management* is the only applicable case on the issue of calculating time for demanding a trial de novo, and the holding is consistent with § 799.207(2).

b. Within 15 days from date written decision was mailed

§ 799.207(3)(a)

2) Absolute right of parties to have their matter heard by Ct

§ 799.207(3)(c)

3) Either party may file a demand for trial before judgment is entered

B. Form of trial

§ 799.21(1)

1) Trial to Ct, unless jury demanded

§ 799.209(2)

2) The rules of evidence generally do not apply. *See* **Sec. 6.C.2)** above

§ 799.21(3)(a)

3) Any party may file demand for trial by jury, provided

a. Demand is written, and

b. Demand is accompanied by payment of fees prescribed by § 814.61(4) and § 814.62(3)(e)

4) Time constraints for jury demand

§ 799.21(3)(a)

a. Within 20 days after joinder of issue, or

b. If eviction action, before or at joinder of issue, or

§ 799.21(3)(b)

c. If there is a Circuit Ct Comm'r, when new trial is demanded, or

d. If party demanding trial does not demand jury, other party may demand jury

- Within 15 days after date of mailing demand for trial, or
- Within 15 days after date on which personal notice of demand given

§ 799.21(3)(b)

5) If no party demands trial by jury, right waived

§ 799.21(4)

C. Trial by jury

1) Judge or Circuit Ct Comm'r to place case on trial calendar and jury of 6 persons to be chosen

2) Action to proceed as if originally begun as civil action under Chs 801–807

3) Ct not required to give complete set of written instructions under § 805.13(4)

4) Appearance by parties governed by § 799.06(2)

D. Trial by Ct

§ 799.21(2)

1) Ct may try case on return date, provided all parties consent

§ 799.215

2) Ct's decision must separately state

a. Findings of fact, and

b. Conclusions of law

§ 799.215

3) Decision must be rendered

a. Orally, immediately following trial, or

b. In writing, within 60 days after submission of case

§ 799.215

4) Judgment shall be entered accordingly

8. Judgment on Failure to Appear

§ 799.22(1)

A. If plaintiff fails to appear, case may be dismissed

B. If Def fails to appear and plead

§ 799.22(2)

1) Ct may enter judgment on due proof of facts showing plaintiff entitled to judgment

§ 799.22(3)

2) In actions on contracts for money due, plaintiff may

   a. File verified complaint or affidavit of facts, or

   b. Offer sworn testimony or other evidence to clerk or Judge

3) Either Judge or clerk may enter judgment

§ 799.225

C. Ct may dismiss any action without notice, provided

1) Issue not joined between plaintiff and Def, and

2) Action was not otherwise disposed of within 6 months of original return date

   a. By judgment, or

   b. By stipulation and order

§ 799.24

D. Judgment; stipulated dismissal

§ 799.25
§ 799.255

E. Costs and fees

§ 799.26

F. Money damages, disclosure of assets statement

§ 799.26(1)
RMC Form SC-506A
RMC Form SC-506B

1) Ct or Circuit Ct Comm'r shall order judgment debtor to execute under penalty of contempt and mail statement to judgment creditor or to Clerk of Ct where judgment entered within 15 days after entry of judgment unless judgment paid

§ 799.26(2)
RMC Form SC-507A
RMC Form SC-507B

2) Failure to comply subjects Def to Ch 785 remedial contempt

§ 799.29

G. Motion or petition to reopen

§ 799.29(1)(a)

1) Standard to reopen is good cause

§ 799.29(1)(b)

2) In ordinance violation cases, motion to be made within 20 days after entry of judgment

§ 799.29(1)(c)

3) In other actions, motion to be made within 12 months after entry of judgment unless venue improper under § 799.11

King v Moore
95 Wis. 2d 686
(Ct. App. 1980)

4) Sec. 806.07 does not apply in small claims actions

§ 799.30

H. Appeal of judgment or order to Ct of Appeals

9. Adjournments

§ 799.27(1)

A. On return date

1) Ct must grant upon request of either party, provided

a. Party appears on return date to make request, and

b. Adjournment at least 7 days or longer

2) In eviction actions, adjournments without cause NOT available, except with consent of plaintiff

§ 799.27(2)

B. Otherwise

§ 799.27(2)

1) Ct may grant continuance for good cause shown, provided

§ 799.27(3)

a. Parties consent, and

§ 799.27(3)

b. Ct sets just terms

§ 799.27(2)

2) Ct cannot extend time for taking of an appeal

10. Evictions

A. Eviction Procedure

§ 799.01(1)(a)
§ 799.40–.45

1) Small claims procedure under Ch 799 applies

2) Service, see **Secs. 2.** and **4.**, *supra*

B. Trial Procedure

§ 766.206(3)

1) When all parties appear on the return date and any party raises valid legal grounds for a contest, hearing must be held before Judge and must not be more than 30 days after return date

§ 799.20(4)

2) In residential eviction action, Ct shall hold and complete Ct or jury trial of issue of possession of premises involved in action within 30 days after return date of summons or any adjourned date, unless parties stipulate otherwise or action is subject to immediate dismissal

§ 799.40(1)

3) Action may be commenced by person entitled to possession of real property or that person's agent

§ 799.40(1m)

4) Acceptance of rent or any other payment after serving notice of default or after commencing action is not grounds for dismissal

§ 799.40(1s)

5) It is not a defense that landlord or tenant has previously waived any violation or breach, including acceptance of late rent

§ 799.40(2)

6) Other claims arising out of tenant's possession or occupancy of the premises may be joined

C. Application for Stay by Tenant

§ 799.40(4)(a)

1) Ct shall stay proceedings in civil action of eviction if tenant applies for emergency assistance under § 49.138, but no stay may be granted after writ of restitution has been issued. If stay is granted, tenant shall inform Ct of outcome of eligibility determination for emergency assistance. Stay remains in effect until tenant's eligibility for emergency assistance is determined and, if tenant is determined to be eligible, until tenant receives emergency assistance, except that stay cannot remain in effect for more than 10 working days

§ 799.40(4)(b)

2) Ct shall stay proceedings in civil action of eviction against a foreclosed homeowner, as defined in § 846.40(1)(b), under the circumstances and as provided in § 846.40(9)

D. Order for Judgment and Writ of Restitution

§ 799.44(1)

1) If Ct finds plaintiff is entitled to possession, Ct shall immediately enter an order for restitution of premises to plaintiff

§ 799.44(2)

2) When ordering judgment for restitution of premises, Ct shall immediately order that writ of restitution be issued, and writ may be delivered to sheriff for execution in accordance with § 799.45. No writ shall be executed if received by sheriff more than 30 days after its issuance

§ 799.44(3)

3) If Ct determines hardship to exist, Ct may stay issuance of writ for up to 30 days after date of order for judgment. Any such stay shall be conditioned on Def paying all rent or other charges due and unpaid at entry of judgment and upon Def paying reasonable value of occupancy of premises, including reasonable charges, during period of stay upon such terms and at such times as Ct directs. Ct may further require Def, as condition of stay, to give a bond in such amount and with such sureties as Ct directs, conditioned on Def's faithful performance of conditions of stay. Upon failure of Def to perform any conditions of stay, plaintiff may file affidavit executed by the plaintiff or Atty, stating the facts of such default, and writ of restitution may forthwith be issued

11. Landlord/Tenant Claims Under Wis Adm Code § ATCP 134.06

§ 100.20(2)

A. Statute permits Department of Agriculture, Trade and Consumer Protection to adopt orders prescribing methods of competition or trade practices

§ 100.20(5)

1) Sec. 100.20(5) provides penalties for violation of orders

a. Twice amount of pecuniary loss

b. Costs, including reasonable Atty fees

Shands v Castrovinci
115 Wis. 2d 352 (1983)

- Applies to appeals
- Applies to funded legal service organizations

2) Wis Adm Code § ATCP 134.06 adopted pursuant to § 100.20(5)

Shands v Castrovinci
115 Wis. 2d 352 (1983)

3) Policy behind § 100.20(5) and Wis Adm Code § ATCP 134.06

a. Encourages tenants to sue when loss may be small compared to costs of litigation

b. Tenant is private AG enforcing public's rights

c. Deterrence

d. Back-up to State's enforcement powers under § 100.20

B. Sec.

704.28 and Wis Adm Code § ATCP 134.06 security deposits

Wis Adm Code
§ ATCP 134.06(1)

1) Check-in procedure

a. 7 days for tenant inspection, notification, and damage repair request

b. If tenant requests, landlord must furnish tenant with written itemization describing damages or defects for which deductions were made from previous tenant's security deposit

Wis Adm Code
§ ATCP 134.06(2)

2) Security deposit

a. Must be returned, less any amounts withheld, within 21 days after any of the following:

- If tenant vacates on termination date, the date on which rental agreement terminates
- If tenant vacates premises or is evicted before termination date, the date on which rental agreement terminates or, if landlord re-rents premises before rental agreement terminates, the date on which new tenant's tenancy begins
- If tenant vacates premises or is evicted after termination date, the date on which landlord learns that tenant has vacated or been removed from premises

Wis Adm Code
§ ATCP 134.06(3)

3) Limitations on security deposit withholding

a. Only amounts reasonably necessary to pay for damage, waste, or neglect, or for nonpayment of

- Rent for which tenant is legally responsible
- Amounts owed for utility service provided by landlord and not included in rent
- Amounts owed for direct utility service by government-owned utility to the extent landlord becomes liable for tenant's nonpayment
- Monthly municipal permit fees assessed by local unit of government

Wis Adm Code
§ ATCP 134.06(3)(b)

b. May withhold for other reasons authorized in rental agreement

- Rental agreement may include "Nonstandard rental provisions" that authorize a landlord to withhold from security deposit for reasons not stated above
- Landlord must specifically identify each provision with tenant before tenant enters agreement
- If tenant signs name or writes initials by nonstandard rental provision, then rebuttable presumption that it has been specifically identified and agreed to

Wis Adm Code
§ ATCP 134.06(3)(c)

c. Cannot withhold for normal wear and tear or losses for which tenant is not responsible

Armour v Klecker
169 Wis. 2d 692
(Ct. App. 1992)

- If trial proves tenant was not responsible for withheld rent, landlord violates Wis Adm Code § ATCP 134.06
- Good-faith belief is no defense

Comment

- Landlord can return security deposit and sue for rent and damages

Wis Adm Code
§ ATCP 134.06(4)

4) Security deposit withholding; statement of claims

a. Within period for returning security deposit under Wis Adm Code § ATCP 134.06(2), landlord shall deliver or mail written statement

- Describing each item of physical damage or other claim made
- Amount withheld as reasonable compensation for each item or claim

Armour v Klecker
169 Wis. 2d 692
(Ct. App. 1992)

- Amounts withheld for items not permitted constitutes violation

b. Intentional misrepresentation or falsification of claims prohibited

Wis Adm Code
§ ATCP 134.06(5)

5) Tenant failure to leave forwarding address

a. Landlord should mail security deposit to last-known address, which may be the leased premises

b. No violation if landlord complies with Wis Adm Code § ATCP 134.06 and postal service unable to complete mail delivery

c. Failure to leave forwarding address does not affect other rights of tenant to return of security deposit

C. Landlord counterclaim

Paulik v Coombs
120 Wis. 2d 431
(Ct. App. 1984)

1) Even if landlord violates Wis Adm Code § ATCP 134.06, not estopped from bringing counterclaim

Three & One Co v Geilfuss
178 Wis. 2d 400
(Ct. App. 1993)

a. Tenant damages may constitute waste

b. If so, damages doubled under § 844.19(2)

Moonlight v Boyce
125 Wis. 2d 298
(Ct. App. 1985)

2) Tenant's award determined irrespective of amount awarded on landlord's counterclaim

a. Tenant's claim is not defeated by landlord's recovery on counterclaim

3) Calculation of damages

Paulik v Coombs
120 Wis. 2d 431
(Ct. App. 1984)

a. First determine if tenant prevails on claim

Moonlight v Boyce
125 Wis. 2d 298
(Ct. App. 1985)

b. If tenant prevails, double pecuniary loss, and award costs and reasonable Atty fees

Touchett v EZ Paintr Corp
14 Wis. 2d 479 (1961)
Three & One Co v Geilfuss
178 Wis. 2d 400
(Ct. App. 1993)

- Atty fees determined on basis of *Touchett* factors

c. If landlord fails to give 21-day notice but prevails on counterclaim, determine amount and deduct from tenant's doubled amount

Pierce v Norwick
202 Wis. 2d 587
(Ct. App. 1996)

d. If landlord gives 21-day notice but violates Wis Adm Code § ATCP 134.06(4) on amount of damages, deduct amount of landlord's actual damages from tenant's loss and then double

Caveat

D. There also may be applicable local ordinances. See § 66.0104, amended effective April 18, 2018, which sets forth specific categories that may constitute habitability violations; and prohibits municipalities from enacting ordinances that limit certain rights of landlords, including imposing requirements beyond the administrative rules with respect to security deposit, earnest money, or pre-tenancy/post-tenancy inspections

12. Automobile Repairs Under Wis Adm Code Ch ATCP 132

A. Wis Adm Code

§ ATCP 132.03 repair order

1) For motor vehicle repairs > $50, shop shall

a. Provide customer with copy of dated repair order and

b. Provide description of repairs to be made

Wis Adm Code
§ ATCP 132.08

c. Record odometer reading on customer copy of repair order

2) Above not required if motor vehicle brought in without face-to-face contact

Huff & Morse, Inc v Riordan
118 Wis. 2d 1
(Ct. App. 1984)

3) Purpose of Wis Adm Code Ch ATCP 132 is to prevent *uncommissioned* repairs

B. Wis Adm Code

§ ATCP 132.04 repair price information

1) Before repairs, shop shall provide customer with

a. Price quotation or

b. Choice of estimate alternatives

C. Wis Adm Code

§ ATCP 132.06 authorization to proceed

1) Shop shall call customer for oral authorization if

a. Repairs will be other than previously authorized

b. Price will exceed quotation or amount designated by customer on estimate alternative

D. Wis Adm Code

§ ATCP 132.07 return of parts

1) Shop shall return to customer parts replaced if requested at time repair order is taken

a. Unless part must be returned to manufacturer under warranty or exchange agreement, and

b. Customer was given opportunity to inspect

2) Shop shall advise customer orally or in writing of right to repair parts

E. Wis Adm Code

§ ATCP 132.09 prohibited practices

1) Penalty is double pecuniary loss and costs, including reasonable Atty fees, pursuant to § 100.20(5)

Huff & Morse Inc v Riordan
118 Wis. 2d 1
(Ct. App. 1984)

2) Violation invalidates oral contract as matter of law

a. Recovery on part of shop restricted to *quantum meruit*, but only if

- Customer consented to the specific repair

b. *Quantum meruit* cannot exceed original amount agreed upon

CV 42: INJUNCTIONS

1. Definition

See Injunctions Black's Law Dictionary (11th ed 2019); 2 Gabrielle B Adams et al, *Wisconsin Civil Procedure Before Trial* ch 7 (State Bar of Wis 7th ed 2021 & Supp)

A. Ct order commanding party to whom it is addressed to do or refrain from doing some act

Trustees of German Evangelical Congregation v Hoessli 13 Wis. 388 (*348) (1861)

1) Injunctions are equitable in nature

Laundry Local 3008 v Laundry Workers Int'l Union 4 Wis. 2d 542 (1958)

2) Injunctions are rarely granted without notice

2. Classification of Injunctions

Laundry Local 3008 v Laundry Workers Int'l Union 4 Wis. 2d 542 (1958)

A. Temporary restraining order

1) Temporary restraint to maintain the status quo until Judge rules on propriety of preliminary injunction

2) May be granted ex parte

SCR 60.04(1)(g)5.

"A Judge may initiate, permit, engage in or consider ex parte communications when expressly authorized by law to do so"

See generally 2 Gabrielle B Adams et al, *Wisconsin Civil Procedure Before Trial* ch 7 (State Bar of Wis 7th ed 2021 & Supp)

B. Temporary or interlocutory injunctions

1) Provisional remedies that are granted before determination on the merits

2) Also known as injunction *pendente lite*

See 2 Gabrielle B Adams et al, *Wisconsin Civil Procedure Before Trial* ch 7 (State Bar of Wis 7th ed 2021 & Supp)

C. Final, permanent, or perpetual injunctions

Granted by judgment decree that finally disposes of the suit

3. Temporary Restraining Orders (TROs)

A. Purpose

Laundry Local 3008 v Laundry Workers Int'l Union 4 Wis. 2d 542 (1958)
Becker v Becker 66 Wis. 2d 731 (1975)
2 Gabrielle B Adams et al, *Wisconsin Civil Procedure Before Trial* ch 7 (State Bar of Wis 7th ed 2021 & Supp)

1) To restrain harm and maintain status quo only until propriety of granting temporary injunction is determined

§ 813.02(1)(a)
St Hyacinth Cong v Borucki 141 Wis. 205 (1910)

2) Entered appropriately when party's rights cannot be adequately protected unless opposing party is restrained from doing act that will defeat object of suit

SCR 60.04(1)(g)5.
Laundry Local 3008 v Laundry Workers Int'l Union 4 Wis. 2d 542 (1958)

3) May be granted ex parte

See, e.g., § 103.56(2)

a. **CAUTION:** Some types of TROs require notice, such as labor disputes and restraint of State agency or officer

SCR 60.04(1)(g)5.

b. Not a violation of Code of Judicial Conduct

Recommendation

c. When possible, opposing counsel should be contacted

§ 813.02

4) May be issued on behalf of Def as well as plaintiff

§ 813.025

5) Effective only until Judge's decision on temporary injunction

Jordan-Jefferson, Inc
v Scheer
16 Wis. 2d 288 (1962)

6) No bond required

B. Procedure for ordinary ex parte TROs

§ 813.02(1)(b)

1) Ct may attempt to contact party sought to be restrained, or party's Atty if known, by telephone for conference between parties to discuss

a. Equities

b. Availability of other remedies

c. Damages that may be sustained if TRO granted

d. Any other relevant matters

e. Local Ct rule may require Atty to contact Atty on other side if known

My Laundry Co
v Schmeling
129 Wis. 597 (1906)

2) Verified complaint is sufficient basis for TRO if

a. Complaint recites sufficient facts to support order, and

See 2 Gabrielle B Adams et al, *Wisconsin Civil Procedure Before Trial* ch 7 (State Bar of Wis 7th ed 2021 & Supp)

b. Complaint is verified on personal knowledge or accompanied by affidavits of persons who have personal knowledge

§ 813.05
§ 813.08

3) Hearing is to be held as soon as reasonably possible through an order to show cause

Jordan-Jefferson, Inc
v Scheer
16 Wis. 2d 288 (1962)

4) Bond not required

C. Issuance of TRO

Akin v
Kewaskum Cmty Sch
64 Wis. 2d 154 (1974)

1) Addressed to sound discretion of Ct

2) Standards for granting TR

Halsey, Stuart & Co
v PSC
212 Wis. 184 (1933)

a. Duty of Ct to grant order when serious irreparable harm may be caused to one party and only slight injury is caused to other

Akin v
Kewaskum Cmty Sch
64 Wis. 2d 154 (1974)

b. Petitioning party must show reasonable probability of success on merits at trial

Dunn v Acme
Auto & Garage Co
168 Wis. 128 (1918)

c. When standards for TRO met and probable petitioner will succeed on merits, TRO should be granted regardless of denials in answer and supporting affidavits

D. TROs requiring notice

1) Orders in labor disputes

§ 103.56(1)(b)

a. Complainant must allege unavoidable substantial and irreparable injury to property

§ 103.56(3)

b. Order to show cause giving at least 48 hours' notice must be given before TRO may be issued

§ 103.56(4)

c. TRO may be effective for no more than 5 days and may not be extended, unless hearing for temporary injunction has begun

§ 103.56(5)

d. Complainant must file bond sufficiently large to cover all damages, costs, and expenses

§ 813.025(2)

2) Orders restraining an order of a State agency, officer, Bd, Dept, or Comm'n, or enforcement of any statute

a. Require notice to AG unless irreparable loss can be shown

b. Effective up to 5 days unless extended

- After notice and hearing

- Upon written consent of parties or Attys

§ 813.025(1)

c. May not be issued by a Circuit or Supplemental Ct Comm'r

4. Temporary Injunctions

A. Notice

§ 813.05(1)

1) If Def has answered, notice and hearing are required

§ 813.05(2)

2) If action is against insurance company or fraternal benefit society, Comm'r of Insurance must be notified

B. Bond

§ 813.06
Becker v Becker
66 Wis. 2d 731 (1975)

1) Bond required in all cases before injunction may be issued, except

§ 767.225

a. In family action, but Ct may require bond

§ 813.12(2)

b. No bond for domestic abuse injunction

§ 813.125(2)

c. No bond for harassment injunction

§ 813.122(2)

d. No bond for child abuse injunction

§ 823.113

e. No bond for injunctions against drug house nuisances

§ 813.11

2) Additional security may be required after injunction has issued

§ 813.06

3) Amount of bond should be enough to cover damages resulting from injunction if Ct later decides party was not entitled to injunction

C. Technical requirements

§ 813.02(1)
§ 813.04

1) Summons and complaint must have been filed

§ 813.02(1)

Permanent injunction is sought, at least in part

§ 813.02(4)

2) No injunction or TRO to issue unless residence of each Def stated, if known

3) Must appear from pleading that application is made in Cty that is proper place for trial

D. Purpose

Shearer v Congdon
25 Wis. 2d 663 (1964)
Gahl v Aurora Health Care, Inc
2022 WI App 29, ¶ 30
403 Wis. 2d 539
aff'd, 2023 WI 35
413 Wis. 2d 418

To maintain status quo until issues can be resolved on merits

Gahl v Aurora Health Care, Inc
2023 WI 35, ¶ 17
413 Wis. 2d 418
Werner v Grootemaat & Sons
80 Wis. 2d 513 (1977)

E. Guidelines for issuance of temporary injunction

Sch Dist v WIAA
210 Wis. 2d 365
(Ct. App. 1997)

1) Petition must show

a. Injunction necessary to preserve status quo

b. Lack of adequate remedy at law

c. Irreparable injury

- Requirement met if shown that permanent injunction sought would be rendered futile without temporary injunction

Gahl v Aurora Health Care, Inc
2022 WI App 29, ¶¶ 57–59, 403 Wis. 2d 539
aff'd on other grounds, 2023 WI 35
413 Wis. 2d 418

- Irreparable injury to respondent is also a consideration

d. Movant must show reasonable probability of success on merits

Sch Dist of Slinger v WIAA
210 Wis. 2d 365, 374 (Ct. App. 1997)

- Movant must be able to state a viable or protectable legal claim or right

2) Not to be issued lightly

3) Not for inconsequential or trivial causes

Appleton Papers, Inc v Home Indem Co
2000 WI App 104
235 Wis. 2d 39

4) Ct has no authority to enjoin party from pursuing in personam action in federal Ct

Gahl v Aurora Health Care, Inc
2023 WI 35, ¶¶ 18, 22
413 Wis. 2d 418
Wis Ass'n of Food Dealers v City of Madison
97 Wis. 2d 426 (1980)

F. Grant or refusal of temporary injunction lies within discretion of Ct

1) Not upset on appeal, unless erroneous exercise of discretion shown

Gahl v Aurora Health Care, Inc
2022 WI App 29, ¶ 60
403 Wis. 2d 539
aff'd on other grounds,
2023 WI 35
413 Wis. 2d 418

2) Not to be granted lightly, particularly for performance of an affirmative action

3) Erroneous exercise of discretion when

Gahl v Aurora Health Care, Inc
2023 WI 35, ¶ 23
413 Wis. 2d 418

a. Judge fails to consider and make record of factors relevant to discretionary determination

b. Judge gives consideration to clearly irrelevant or improper factors

c. Judge clearly gives too much weight to one factor

Sch Dist of Slinger v WIAA

210 Wis. 2d 365
(Ct. App. 1997)

d. Judge grants relief on the basis of a pleading that fails to state a viable legal claim

§ 805.17(2)
Pure Milk Prods Co-op v Nat'l Farmers Org
90 Wis. 2d 781 (1979)

G. Ct must file written findings of fact and conclusions of law, which constitute grounds for its action

Gahl v Aurora Health Care, Inc
2023 WI 35, ¶ 26
413 Wis. 2d 418

Ct must make it clear that it examined relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach

5. Permanent Injunctions

Pure Milk Prods Co-op v Nat'l Farmers Org
90 Wis. 2d 781 (1979)

A. Guidelines for issuance of permanent injunction

1) Not to be issued lightly

2) Cause must be substantial

3) Plaintiff must show

a. Sufficient probability that future conduct of Def will violate a right of and cause injury to plaintiff

Ferguson v City of Kenosha
5 Wis. 2d 556 (1958)

b. Injury will be irreparable

Cty of Columbia v Bylewski
94 Wis. 2d 153 (1980)

- Municipality not required to show irreparable injury

c. No adequate remedy at law

- Not adequately compensable by damages

4) Request addressed to sound discretion of Ct

a. Competing interests must be reconciled

b. Plaintiff must satisfy Ct that on balance equity favors issuing injunction

Hoffman v WEPCO
2003 WI 64
262 Wis. 2d 264

c. Ct may prescribe a specific method to abate nuisance

Forest Cty v Goode
219 Wis. 2d 654 (1998)

5) Municipal zoning enforcement case: Once a violation shown, Ct should grant injunction; but Ct may deny for compelling equitable reasons

Town of Delafield
v Winkelman
2003 WI App 92
264 Wis. 2d 264, *aff'd*
2004 WI 17
269 Wis. 2d 109

a. Violator must be given chance to present equitable arguments even if previously lost certiorari review on "arbitrary and unreasonable" grounds

Village of Hobart
v Brown Cty
2005 WI 78, ¶ 2
281 Wis. 2d 628

b. Must weigh equitable considerations, including equitable defenses, in deciding whether to grant injunction

Sunnyside Feed Co
v City of Portage
222 Wis. 2d 461, 473
(Ct. App. 1998)

6) If nuisance continuing rather than permanent, injunction to abate probably should issue

Ferguson v
City of Kenosha
5 Wis. 2d 556, 561 (1958)

B. Existence of remedy at law does not deprive Ct of equity jurisdiction

City of Milwaukee
v Burnette
2001 WI App 258
248 Wis. 2d 820

Fact that enjoined acts are criminal does not bar injunctive relief

Gale v Cutler
1 Pin 253, 260 (1842)
See 2 Gabrielle B Adams
et al, *Wisconsin Civil*
Procedure Before Trial
ch 7 (State Bar of Wis
7th ed 2021 & Supp)

C. Injunctive relief will be denied when plaintiff

1) Has failed to do equity

2) Has been guilty of laches

3) Has lost right by waiver, acquiescence, or estoppel

Metz v
Veterinary Examining Bd
2007 WI App 220, ¶ 2
305 Wis. 2d 788

4) Has failed to exhaust administrative remedies

Luebke v
City of Watertown
230 Wis. 512, 515 (1939)

D. Plaintiff's request for permanent injunction must be considered as motion for final judgment

§ 813.12
§ 813.122
§ 813.125
§ 813.127

6. Domestic Abuse, Child Abuse, Harassment TRO/Injunction

For these and combined actions, see **Family Benchbook**

CV 43: CONTEMPT

1. Contempt Generally

A. Governed by Ch 785

St v King
82 Wis. 2d 124 (1978)

B. Contempt statutes are a legislative limitation on Ct's inherent power

§ 785.02

1) Ch 785 limits contempt power to Cts of record

§ 785.06, § 785.04

Agencies, Ct Comm'rs, and Muni Cts may petition Circuit Ct for remedial or punitive sanctions

Frisch v Henrichs
2007 WI 102, ¶ 32
304 Wis. 2d 1

2) When the procedures and penalties of contempt are prescribed by statute, the statute controls

§ 785.01

C. Applies only to intentional conduct. *But see infra* Sec. 3.C.

D. There are two types of contempt: summary contempt and non-summary contempt. See Sec. 5, *infra*, for comparison chart

The Ct only has the authority to initiate a summary contempt, and only for actions that occur in the presence of the Ct. Remedial sanctions must be requested by a party in a non-summary contempt. Non-summary punitive contempt is prosecuted by the DA, AG, or a Special Prosecutor

E. Contempt of Ct is defined as

§ 785.01(1)(b)

1) Disobedience, resistance, or obstruction of the authority, process, or order of the Ct

§ 785.01(1)(bm)

2) Violation of any provision of § 767.117(1)

§ 785.01(1)(br)

3) Violation of an order under § 813.1285(4)(b)2. (firearm possession)

§ 785.01(1)(c)

4) Refusal as a witness to appear, be sworn, or answer a question

§ 785.01(1)(d)

5) Refusal to produce a record, document, or other object

2. Summary Contempt

§ 785.01(1)(a)

A. Defined as misconduct in presence of Ct, which interferes with a Ct proceeding or administration of justice or impairs the respect due the Ct

Valadez v Aprahamian
Nos 2021AP994,
2021AP1186
2022 WL 301655, ¶ 32
(Wis CA 2/2/2022)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

1) Because the power to punish for contempt is drastic, it should be directed against substantial and not trivial offenses

2) Examples

Valadez v Aprahamian
Nos 2021AP994,
2021AP1186
2022 WL 301655
(Wis CA 2/2/2022)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

a. Repeated interruption of Ct may qualify as misconduct to which summary contempt procedures apply

Oliveto v
Crawford Cty Cir Ct
194 Wis. 2d 418 (1995)

b. Audible remark of "ridiculous" by defense Atty may warrant summary contempt procedures

McGee v Racine
Cty Circuit Ct
150 Wis. 2d 178, 181–82
(Ct. App. 1989)

B. Dispenses with formality, delay, and disgression resulting from issuance of process, service of pleadings, hearing, evidence, arguments, briefs, etc.

§ 785.03(2)
Oliveto v
Crawford Cty Cir Ct
194 Wis. 2d 418 (1995)

C. Four requirements before Ct can impose summary contempt

§ 785.03(2)

1) Misconduct must be committed in the actual presence of the Ct

Gower v Circuit Ct for
Marinette Cty
154 Wis. 2d 1 (1990)

a. Tardiness and failure to appear are not in actual presence of the Ct

Valadez v Aprahamian
Nos 2021AP994,
2021AP1186
2022 WL 301655
(Wis CA 2/2/2022)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

b. Ex parte emails sent to Judge are considered not in presence of Ct

§ 785.03(2)

2) Sanction must be imposed to preserve order in the Ct

§ 785.03(2)

3) Sanction must be imposed to protect the authority and dignity of the Ct

§ 785.03(2)

4) Sanction must be imposed immediately following contempt

See Oliveto v Crawford
Cty Circuit Ct
194 Wis. 2d 418 (1995)

D. Ct must make specific findings

1) (Date) (time) Branch _____, _____ County Circuit Ct being in regular session, and

2) (Name of action), (case number) being then before the Ct for (trial) (hearing), and

3) (Name of contemnor) did there and then, in open Ct, in the immediate view of and in the presence of the Ct (and jury), engage in disorderly, contemptuous, and insolent behavior, directly tending to interrupt the Ct's proceedings and to impair the authority and dignity of this Ct, and

4) In that (name of contemnor) did (specify each contemptuous act), and

5) The disorderly, contemptuous, and insolent behavior of (name of contemnor) has, beyond a reasonable doubt, seriously destroyed the order, authority, and dignity of this Ct and must be dealt with under the Ct's inherent and statutory powers to summarily punish such conduct

Oliveto v Crawford
Cty Cir Ct
194 Wis. 2d 418 (1995)

E. Contemnor must be given right of allocution

1) Provide an opportunity for contemnor to apologize or to explain or defend the contemptuous behavior

Valadez v Aprahamian
Nos 2021AP994,
2021AP1186
2022 WL 301655, ¶ 29
(Wis CA 2/2/2022)
(unpublished opinion
citable for persuasive
value per § 809.23(3)(b))

2) Allocution permits Judge to vacate contempt order entirely or to give more lenient sanction

F. Ct to impose sentence on record

1) The only alternative sanctions are:

§ 785.04(2)(b)

a. Fine not to exceed $500

b. Confinement in Cty Jail up to 30 days

c. Both

2) No purge conditions are authorized

3. Non-Summary Remedial Contempt

A. Often used in family Ct proceedings. For a more detailed discussion in this context, see Family Benchbook FA 4

B. Purposes

Carney v CNH Health & Welfare Plan
2007 WI App 205, ¶ 20
305 Wis. 2d 443

1) To uphold the authority and dignity of Ct

Frisch v Henrichs
2007 WI 102, ¶ 35
304 Wis. 2d 1

2) To enforce private interests of litigants and force one party to accede to another's demand

Christensen v Sullivan
2009 WI 87, ¶ 75
320 Wis. 2d 76

3) To terminate continuing contempt

a. May not be imposed if contempt has ceased

Frisch v Henrichs
2007 WI 102
304 Wis. 2d 1

b. Contempt considered to be continuing if compliance comes too late to cure the problems caused by noncompliance

C. Intent

Carney v CNH Health & Welfare Plan
2007 WI App 205, ¶ 19
305 Wis. 2d 443

Although statute defines contempt as "intentional," the absence of willfulness does not relieve a party from a finding of civil contempt; culpability is a factor to be considered when determining sanctions

D. Procedure

§ 785.03(1)

1) Initiated by person aggrieved by contempt filing a motion or order to show cause

Evans v Luebke
2003 WI App 207, ¶ 23
267 Wis. 2d 596

Aggrieved person must be someone other than the Ct

Joint Sch Dist No 1 v Wis Rapids Educ Ass'n
70 Wis. 2d 292 (1975)

2) Motion or order to show cause need not be personally served; actual notice satisfies due-process requirements

Besaw v Besaw
89 Wis. 2d 509 (1979)

3) Burden of proof is on person against whom contempt is charged to show that person's conduct is not contemptuous

See Upper Lakes Shipping Ltd v Seafarers Int'l Union of Canada
23 Wis. 2d 494 (1964)

4) Hearing, evidence, findings required

Frisch v Henrichs
2007 WI 102
304 Wis. 2d 1

5) Broad interpretation of remedial contempt

St v Pultz
206 Wis. 2d 112 (1996)

6) Ct must advise person of right to counsel and right to appointment of counsel if indigent and if imprisonment is sanction

E. Sanctions

§ 785.04(1)(a)

1) Payment to compensate loss or injury suffered by party as a result of contempt

§ 785.04(1)(b)

2) Imprisonment—6 months or as long as contempt continues, whichever is shorter

§ 785.04(1)(c)

3) Forfeiture not to exceed $2,000 per day for each day contempt continues

§ 785.04(1)(d)

4) An order designed to ensure compliance with prior order of the Ct

§ 785.04(1)(e)

5) If Ct finds preceding sanctions would be ineffectual to terminate contempt, Ct may fashion a different sanction

Balaam v Balaam
52 Wis. 2d 20 (1971)

F. Contempt not allowed for failure to comply attributable to inability to comply

Diane KJ v James LJ
(In re Paternity of Cy CJ)
196 Wis. 2d 964
(Ct. App. 1995)

G. Must be purgeable

City of Milwaukee v Washington (In Interest of Washington)
2007 WI 104, ¶ 65
304 Wis. 2d 98

1) Purge conditions must clearly spell out what contemnor must do to be purged and purge conditions must be within the power of the contemnor

Larsen v Larsen
159 Wis. 2d 672
(Ct. App. 1990),
aff'd, 165 Wis. 2d 679
(1992)

2) Purge conditions must be reasonably related to the cause or nature of the contempt and designed to end contempt

H. Violation of purge conditions

St ex rel VJH v CAB
163 Wis. 2d 833
(Ct. App. 1991)

Before being committed to jail for alleged failure to comply with purge conditions, contemnor entitled to hearing

Contemnor has burden to show purge conditions unreasonable or noncompliance was unintentional or result of unforeseen events

4. Non-Summary Criminal Contempt

A. Sometimes referred to as Non-Summary Punitive Contempt

§ 785.03(1)(b)

B. Initiated by criminal complaint by DA, AG, or Special Prosecutor

C. For a more detailed discussion see Criminal Benchbook CR 47

5. Comparison of Summary and Non-Summary Contempt Procedures: Chart

Type of Contempt	Type of Sanction: Punitive	Type of Sanction: Remedial
Summary	–Initiated by the Ct –Contempt must occur in presence of Ct –Must be given opportunity for allocution –Sanction made immediately –Sanctions listed at § 785.04(2)(b): $500 fine, up to 30 days in jail, or both	Not available
Non-Summary	–Initiated by DA, AG, or Special Prosecutor (can be referred by Ct) –Criminal procedure used –Sanctions listed at § 785.04(2)(a): $5,000 fine, up to 1 year in jail, or both	–Must be initiated by aggrieved party on motion with notice and hearing –Sanctions listed at § 785.04(1)(a)–(e). *See supra* Sec. 3.E. –Must be purgeable sanction

CV 44: SECTION 1983 ACTIONS IN STATE COURT

1. 42 USC § 1983

A. Definition

42 USC § 1983
7th Cir JI—Cv

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable

B. Purpose

Adickes v SH Kress & Co
90 S. Ct. 1598, 1604
(1970)

1) To create a tort remedy for deprivation of the federal Constitution and law by governmental conduct

2) To deter such governmental conduct

Inyo Cty v
Paiute-Shoshone Indians
123 S. Ct. 1887, 1894
(2003)

3) To secure private rights against governmental encroachment

2. Jurisdiction

Terry v Kolski
78 Wis. 2d 475 (1977)

A. Jurisdiction: Concurrent/Federal and State

B. Subject-matter jurisdiction

Ande v Rock
2002 WI App 136, ¶ 14
256 Wis. 2d 365
(quoting *Chapman*
v Houston Welfare
Rights Org
99 S. Ct. 1905 (1979))

1) 42 USC § 1983 does not create substantive rights. Only provides a remedy for the deprivation of other federal rights

Staples v Young
149 Wis. 2d 80 (1989)
Weber v
City of Cedarburg
129 Wis. 2d 57 (1986)

2) Is a constitutional or federal statutory right of plaintiff implicated by the facts? Three-part test to evaluate whether federal statute gives rise to federal right:

Keup v DHFS
2004 WI 16
269 Wis. 2d 59

a. Congress must have intended that the provision benefit the plaintiff

b. Alleged "right" is not so vague and amorphous that its enforcement would strain judicial competence

c. Must unambiguously impose a binding obligation on the states

Gonzaga Univ v Doe
122 S. Ct. 2268, 2275
(2002)
Blessing v Freestone
117 S. Ct. 1353, 1359
(1997)

NOTE: The claim must assert a violation of a federal right, not simply a federal law that might provide benefits.

Daniels v Williams
106 S. Ct. 662 (1986)
Davidson v Cannon
106 S. Ct. 668 (1986)
Saenz v Murphy
162 Wis. 2d 54 (1991)
overruled in part
on other grounds by
St ex rel Anderson-El
v Cooke
2000 WI 40
234 Wis. 2d 626

3) Is a constitutional right of plaintiff deprived by the governmental conduct?

City of Rancho Palos
Verdes v Abrams
125 S. Ct. 1453, 1458
(2005)

4) When the violated federal statute itself provides express, private means of redress, it is presumed that Congress did not intend for it to be enforceable through 42 USC § 1983

Inyo Cty v
Pauite-Shoshone Indians
123 S. Ct. 1887 (2003)

5) Only private rights are enforceable under 42 USC § 1983. States, Native American tribes, and Federal Gov't cannot enforce "sovereign rights" through 42 USC § 1983

C. Persons covered as Defs

Hafer v Melo
112 S. Ct. 358 (1991)
Will v
Michigan Dep't of Police
109 S. Ct. 2304 (1989)

1) Is Def a suable person?

Monell v
Dep't of Soc Servs
98 S. Ct. 2018 (1978)

a. Includes municipalities, but does not include the state

Will v
Michigan Dept of Police
109 S. Ct. 2304, 2312 n10
(1989)

b. Does not include suits against public officials when sued in their official capacity, except if sued for declaratory or prospective injunctive relief

2) Is there state action?

Lugar v Edmundson Oil
102 S. Ct. 2744 (1982)

a. Under color of law

b. Usually a question of law answered by Ct

3) *See also infra* **Sec. 5** (Local Government Liability) and **Sec. 3.D.** (Conduct Required)

D. Prerequisites to jurisdiction

§ 893.53

1) Statute of limitation is 3 years

Wallace v Kato
127 S. Ct. 1091, 1094–95
(2007)

a. The time at which a claim accrues is a question of federal law. Typically this is when a plaintiff has a complete and present cause of action

§ 893.16(1)

b. No tolling for imprisonment

Patsy v Bd of Regents
102 S. Ct. 2557 (1982)
Felder v Casey
139 Wis. 2d 614 (1987)
rev'd, 108 S. Ct. 2302
(1988)

2) Neither exhaustion of administrative remedies nor notice of claim under § 893.82 required

Fair Assessment in Real
Est Ass'n v McNary
102 S. Ct. 177 (1981)
Hogan v Musolf
163 Wis. 2d 1 (1991)

a. Except tax cases

1995 PLRA
42 USC § 1997e(a), (b)

b. Prisoner cases require exhaustion of administrative remedies

State ex rel Ledford
v Cir Ct
228 Wis. 2d 768
(Ct. App. 1999)

- Notice of claim is not an administrative remedy

Booth v Churner
121 S. Ct. 1819, 1825
(2001)
St ex rel Hensley
v Endicott
2001 WI 105, ¶¶ 1, 9, 22
245 Wis. 2d 607

- Duty to exhaust applies "regardless of the relief offered through administrative procedures"

Pozo v McCaughtry
286 F3d 1022, 1025
(7th Cir 2002)

- Exhaustion requires timely pursuit of administrative remedies

§ 802.05(4)
St ex rel Kaufman
v Karlen
2005 WI App 14, ¶ 9 n3
278 Wis. 2d 332

- Inmate must attach evidence of exhaustion to pleadings

Porter v Nussle
122 S. Ct. 983, 992 (2002)

- "PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong"

St ex rel Freeman v Berge
2002 WI App 213, ¶ 13
257 Wis. 2d 236
St ex rel Frasch v Cooke
224 Wis. 2d 791, 796–97
(Ct. App. 1999)

- In state Ct, failure to plead exhaustion is a failure to state a claim upon which relief can be granted

3. Cause of Action

Jones v Dane Cty
195 Wis. 2d 892
(Ct. App. 1995)

A. Substantive Due Process: Gov't deprivation of certain property or liberty interests is actionable regardless of fairness of procedures used

1) Incorporated rights violation

Duncan v Louisiana
88 S. Ct. 1444 (1986)

2) Arbitrary and capricious conduct

Rochin v California
72 S. Ct. 205 (1952)

3) Conduct that shocks conscience

Ande v Rock
2002 WI App 136, ¶ 21

256 Wis. 2d 365
(quoting *Cty of Sacramento v Lewis*
118 S. Ct. 1708 (1998))

4) Conduct that interferes with rights that are implicit in concept of ordered liberty

B. Procedural Due Process: Gov't deprivation of life, property, or liberty interests is actionable only if lacking procedural fairness

Parratt v Taylor
101 S. Ct. 1908 (1981)
Penterman v WEPCO
211 Wis. 2d 458 (1997)

1) Deprivation of life, liberty, or property interest

Jones v Dane Cty
195 Wis. 2d 892
(Ct. App. 1995)

2) Without due process

Goldberg v Kelly
90 S. Ct. 1011 (1970)
Zinermon v Burch
110 S. Ct. 975 (1990)

a. Was a pre-deprivation hearing necessary and feasible?

Zinermon v Burch
110 S. Ct. 975, 985–87
(1990)
Hamlin v Vaudenberg
95 F3d 580, 584
(7th Cir 1996)
Casteel v Kolb
176 Wis. 2d 440, 445–46
(Ct. App. 1993)

b. There is no procedural-due-process violation for conduct that is random and unauthorized if there is an adequate postdeprivation remedy

3) Adequacy of state remedy

a. State remedy need not be coextensive with 42 USC § 1983 remedies

Weber v
City of Cedarburg
129 Wis. 2d 57 (1986)
Enright v Bd of Sch Dirs
118 Wis. 2d 236 (1984)

- Available state remedy may negate any procedural-due-process violation

Hanlon v Town of Milton
2000 WI 61
235 Wis. 2d 597

b. However, cannot bring claim for money damages grounded on 42 USC § 1983 in certiorari proceeding under Ch 68

C. Claim under equal protection

Thorp v Town of Lebanon
2000 WI 60, ¶ 43
235 Wis. 2d 610

Availability of certiorari review is not an adequate state law remedy for damages for an equal-protection violation

Postdeprivation hearing will satisfy claim alleging violation of procedural due process, but not necessarily claim alleging violation of equal protection, at least as to a damage claim

D. Conduct required

1) State of mind

Parratt v Taylor
101 S. Ct. 1908 (1981),
overruled on other grounds by
Daniels v Williams
106 S. Ct. 662 (1986)

a. No state-of-mind requirement imposed other than as necessary to state underlying basis for liability

Daniels v Williams
106 S. Ct. 662 (1986)
Davidson v Cannon
106 S. Ct. 668 (1986)

b. Mere negligence not enough for a due-process claim

- Intentional conduct

Comment

- Probably includes reckless conduct or gross negligence

c. No specific intent necessary

2) Causation

Mt Healthy Bd of Educ v Doyle
97 S. Ct. 568 (1977)

a. Cause-in-fact required: “but for” test

b. Proximate cause requires

- Reasonable foreseeability

DeShaney v
Winnebago Cty DHSS
109 S. Ct. 998 (1989)
Kara B v Dane Cty
205 Wis. 2d 140 (1996)
Jones v Dane Cty
195 Wis. 2d 892
(Ct. App. 1995)

- Affirmative governmental duty under special circumstances

Prahl v Brosamle
98 Wis. 2d 130 (1980)

3) Conduct of a private actor not actionable, unless

a. Public Function: Private party was exercising powers that are traditionally and exclusively reserved to the government

Kara B v Dane Cty
198 Wis. 2d 24, 51
(Ct. App. 1995)
aff'd, 205 Wis. 2d 140 (1996)
see also San Francisco
Arts & Athletics, Inc
v US Olympic Comm
107 S. Ct. 2971 (1987)
Jackson v
Metropolitan Edison Co
95 S. Ct. 449 (1974)

b. State Compulsion: State was exercising such coercive power or providing such significant encouragement that private actor's conduct must be deemed to be that of the State

c. Symbiotic Relationship: There is sufficiently close nexus between gov't and challenged private action that it may be fairly treated as that of gov't

4. Recovery

A. Compensatory damages

Carey v Piphus
98 S. Ct. 1042 (1978)

1) Special damages

Carey v Piphus
98 S. Ct. 1042 (1978)

a. Absent a showing of actual damages, damages not presumed for violation of civil right

Hough v Dane Cty
157 Wis. 2d 32, 43 n4
(Ct. App. 1990)

b. Absent showing of actual damages, plaintiff establishing a due-process violation entitled to nominal damages because right to procedural due process is absolute

2) General damages

Duty to mitigate

B. Punitive damages

Smith v Wade
103 S. Ct. 1625 (1983)

1) Requisite showing

a. Reckless or careless disregard for rights, or

b. Deliberate indifference

2) Need not show malicious intent

Newport v Fact Concerts
101 S. Ct. 2748 (1981)

3) Punitive damages not available against municipalities

C. Injunctive relief

Will v
Michigan Dept of Police
109 S. Ct. 2304, 2312 n10
(1989)

1) Prospective injunctive relief will lie against a state officer even when acting in an official capacity

42 USC § 1983

2) As to a judicial officer, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable

D. Reasonable Atty fees

Thompson v
Village of Hales Corners
115 Wis. 2d 289 (1983)

1) To successful plaintiff under 42 USC § 1988

Texas State Teachers
Ass'n v Garland Indep
Sch Dist
109 S. Ct. 1486, 1493
(1989)

a. There must be an enforceable judgment on the merits to justify award of Atty fees

- Must succeed on significant issue in litigation

Buckhannon Bd & Care
Home, Inc v W Va Dep't

of Health & Human Resources
121 S. Ct. 1835, 1843 (2001)

b. Catalyst theory—which awards fees if a suit induces a change in behavior—has been rejected

Christiansburg Garment Co v EEOC
98 S. Ct. 694 (1978)

2) To Def if action wholly frivolous, unreasonable, or without foundation

Fox v Vice
131 S. Ct. 2205 (2011)

In a case involving both frivolous and nonfrivolous claims, Def may recover fees that would not have been incurred "but for" frivolous portion of claim

Hartman v Winnebago Cty
216 Wis. 2d 419 (1998)

3) Must request Atty fees within 30 days after judgment

Governed by time limit of § 806.06(4)

4) Determination of reasonableness

Hensley v Eckerhart
103 S. Ct. 1933 (1983)
Bialk v Milwaukee Cty
180 Wis. 2d 374
(Ct. App. 1993)

a. "Lodestar" is starting point adjusted by 12 factors in *Hensley*

Paradinovich v Milwaukee Cty
189 Wis. 2d 184
(Ct. App. 1994)
(adopting *City of Burlington v Dague*
112 S. Ct. 2638 (1992))

b. Enhancement for contingency fee above "lodestar" not permitted

5. Local Government Liability

Monell v Dep't of Soc Servs
98 S. Ct. 2018 (1978)

A. Governmental body

1) Suable person under 42 USC § 1983, if plaintiff can

Slabey v Dunn Cty
2023 WI 2, ¶ 24
405 Wis. 2d 404

a. Identify a municipal policy or custom that caused injury; and

b. Show the municipal action was taken with the requisite degree of culpability; and

c. Show a direct causal link between the municipal action and the deprivation of federal rights

2) No liability under respondeat superior

Newport v Fact Concerts
101 S. Ct. 2748 (1981)

3) Cannot recover punitive damages

a. No deterrence factor because taxpayers pay the damages

Thompson v
Village of Hales Corners
115 Wis. 2d 289 (1983)

b. However, liability for actual damages cannot be limited by state law

4) No qualified immunity for municipality itself

Jett v
Dallas Indep Sch Dist
109 S. Ct. 2702 (1989)
Pembaur v
City of Cincinnati
106 S. Ct. 1292 (1986)

B. Governmental official or employee

Hafer v Melo
112 S. Ct. 358 (1991)

1) Sued in official capacity is same as suing municipality

a. Must be final decision-maker or policy-maker

St Louis v Praprotnik
108 S. Ct. 915 (1987)

- Question of local law, not fact

§ 895.46
Olson v Connerly
156 Wis. 2d 488 (1990)
Graham v Sauk Prairie
Police Comm'n
915 F2d 1085
(7th Cir 1990)

b. Must be within scope of employment in order for the employee to be indemnified for any judgment

Cameron v
City of Milwaukee
102 Wis. 2d 448, 456, 460
(1981)

Selerski v
Village of W Milwaukee
212 Wis. 2d 10
(Ct. App. 1997)

c. Employee can be acting under color of law for purposes of liability under 42 USC § 1983 even if not acting within scope of his/her employment

2) Sued in personal capacity

a. Must be alleged or determined from course of proceedings

b. If silent, assumed to be in official capacity

Penterman v
Wis Elec Power
211 Wis. 2d 458 (1997)

c. May be qualifiedly immune

6. Immunities and Defenses

A. Absolute immunity

1) Protected classes

Supreme Ct of Va
v Consumers Union
of US, Inc
100 S. Ct. 1967 (1980)

a. Legislative immunity

42 USC § 1983

b. Judicial immunity

Stump v Sparkman
98 S. Ct. 1099 (1978)
Pierson v Ray
87 S. Ct. 1213 (1967)

- Must be judicial act

- Nonjudicial act may be qualifiedly immune

Imbler v Pachtman
96 S. Ct. 984, 995 (1976)

c. Prosecutorial immunity

- Must be advocative conduct

Briscoe v LaHue
103 S. Ct. 1108 (1983)

d. Witnesses

B. Qualified immunity

Baxter v DNR
165 Wis. 2d 298, 302
(Ct. App. 1991)

1) Applies to discretionary functions

Baxter v DNR
165 Wis. 2d 298, 302
(Ct. App. 1991)
(quoting *Malley v Briggs*
106 S. Ct. 1092, 1096
(1986))

2) Protects all but the plainly incompetent and those who knowingly violate the law

Barnhill v Bd of Regents
166 Wis. 2d 395 (1991)

3) Affirmative defense

Gomez v Toledo
100 S. Ct. 1920 (1980)

Must be raised or is waived

Harlow v Fitzgerald
102 S. Ct. 2727 (1982)
Hillman v Columbia Cty
164 Wis. 2d 376
(Ct. App. 1991)

4) Purely objective test (disregard subjective intent)

a. Almost always question of law

Saucier v Katz
121 S. Ct. 2151, 2155–56
(2001)
See Pearson v Callahan
129 S. Ct. 808, 818 (2009)

b. Reasonableness test: Two-part inquiry may be considered in proper sequence

- Was a constitutional right violated?
- In light of the specific context of the case, would a reasonable official have known that the right was clearly established?

Anderson v Creighton
107 S. Ct. 3034 (1987)
Davis v Scherer
104 S. Ct. 3012 (1984)

c. Must be clearly established law

Kara B v Dane Cty
198 Wis. 2d 24

(Ct. App. 1995)
aff'd, 205 Wis. 2d 140
(1996)

- Burden of proof on plaintiff

Elder v Holloway
114 S. Ct. 1019 (1994)

- Whether law is clearly established presents question of law

Allen v Guerrero
2004 WI App 188
276 Wis. 2d 679

- No immunity when it is uncertain which right was violated as long as it is clear that some federal right was violated

Baxter v DNR
165 Wis. 2d 298, 302
(Ct. App. 1991)
(quoting *Malley v Briggs*
106 S. Ct. 1092, 1096
(1986))

- If reasonable officials could disagree, immunity should be recognized

KH v Morgan
914 F2d 846
(7th Cir 1990)

5) Raised on motion to dismiss or summary judgment and should be heard at earliest opportunity

Acharya v AFSCME
146 Wis. 2d 693
(Ct. App. 1988)

C. Administrative res judicata/Estoppel by record—claim preclusion

Lindas v Cady
175 Wis. 2d 270
(Ct. App. 1993)

1) Identity of parties or their privies

Northern States
Power Co v Bugher
189 Wis. 2d 541 (1995)

2) Identity of causes of action or claims brought or that could have been brought

3) See **CV 6** (Dispositive Motions), **Sec. 4** (Motion for Claim or Issue Preclusion)

D. Administrative collateral estoppel—issue preclusion

Lindas v Cady
183 Wis. 2d 547 (1994)

1) Agency was adjudicating a disputed fact

Univ of Tennessee
v Elliott
106 S. Ct. 3220 (1986)

2) Parties provided adequate opportunity to litigate the issue

Identity of parties not required

Gould v DHSS
216 Wis. 2d 356
(Ct. App. 1998)

3) Non-mutual offensive use of issue preclusion rejected in proceeding against governmental agency

4) See **CV 6** (Dispositive Motions), **Sec. 4** (Motion for Claim or Issue Preclusion)

E. For discussion of prisoner litigation, see CV 45

CV 45: PRISONER LITIGATION

1. Prison Litigation Reform Act (PLRA)

A. Purpose of State PLRA

St ex rel Henderson
v Raemisch
2010 WI App 114, ¶ 28
329 Wis. 2d 109
28 USC 1915(g)
42 USC 1997e
§ 801.02(7)(d)
§ 802.05(4)

1) While both federal and state PLRAs seek to deter frivolous lawsuits, Wisconsin PLRA has additional purpose of limiting taxpayer subsidy of prisoner litigation

St ex rel Henderson
v Raemisch
2010 WI App 114, ¶ 28
329 Wis. 2d 109

2) Wisconsin PLRA is broader than Federal PLRA in that it targets prisoner litigation generally, not just conditions of confinement cases

B. Prisoner defined

§ 801.02(7)(a)2.

1) Includes any person detained in a correctional institution or by a law enforcement officer

St ex rel Cramer v Wis Ct
App (In re Application
of Prison Litigation
Reform Act)
2000 WI 86
236 Wis. 2d 473
St ex rel Marth v Smith
224 Wis. 2d 578
(Ct. App. 1999)

2) Includes one challenging a probation or parole revocation

St ex rel Stinson
v Morgan
226 Wis. 2d 100
(Ct. App. 1999)

3) Includes one challenging a mandatory release date calculation

4) Does not include

a. Person committed under Ch 980

b. Person seeking relief from TPR judgment

c. Person seeking relief from judgment of conviction or sentence of a Ct

d. Person seeking interlocutory appeal in a criminal or Ch 980 case

e. Person committed under Ch 51 or Ch 55, or § 971.14(2) or (5)

St ex rel Frohwirth
v Parole Comm'n
2000 WI App 139
237 Wis. 2d 627
St ex rel Speener
v Gudmanson
2000 WI App 78
234 Wis. 2d 461

f. Persons transferred to out-of-state prisons but includes person who was in-state during running of statute of limitation

§ 801.02(7)(b)

C. PLRA exhaustion requirements

§ 801.02(7)(b)

1) No prisoner may commence a civil action or special proceeding with respect to prison or jail conditions until the prisoner has first exhausted all available administrative remedies promulgated by the Department of Corrections (DOC) or the sheriff, superintendent, or other keeper of a jail

§ 801.02(7)(a)3.

a. "Prison or jail conditions" is broadly defined and means any matter related to the conditions of confinement or to the effects of actions by governmental officers, employees, or agents on the lives of prisoners

St v Williams
2018 WI App 20, ¶¶ 4–5
380 Wis. 2d 440

- Includes deduction of restitution from inmate accounts

Wis Adm Code
Ch DOC 310

b. Wis Adm Code Ch DOC 310 establishes administrative grievance procedures that are available to Wisconsin state inmates

Woodford v Ngo
126 S. Ct. 2378 (2006)
Pozo v McCaughtry
286 F3d 1022, 1025
(7th Cir 2002)

2) Proper exhaustion of administrative remedies requires compliance with an agency's deadlines and other critical procedural rules

St ex rel Laurich
v Litscher
2004 WI App 150, ¶ 9
275 Wis. 2d 769

3) Grievances that are properly rejected by a complaint examiner as untimely do not constitute exhaustion of administrative remedies

St ex rel Freeman v Berge
2002 WI App 213
257 Wis. 2d 236

4) However, if inmate submits untimely administrative grievance that is decided by prison on the merits rather than dismissed as untimely, then this is proper exhaustion

St ex rel Hensley
v Endicott
2001 WI 105, ¶ 13
245 Wis. 2d 607

5) No futility exception to exhaustion requirement of the PLRA

§ 801.02(7)(bm)

6) To exhaust administrative remedies under Wisconsin's PLRA, prisoner must also comply with § 893.80 or § 893.82 before filing action, unless the prisoner is

§ 814.29(1)(b)

a. Filing a common-law certiorari petition, or

§ 814.29(1)(b)

b. Seeking injunctive relief and there is a substantial risk to the prisoner's health or safety

NOTE: *See* **CV 7, Sec. 10** (Claims Against State Employees).

§ 814.29(1m)
Spence v Cooke
222 Wis. 2d 530, 534
(Ct. App. 1998)
RMC Forms CV-438 to
CV-441

D. PLRA rules for prisoners who seek to proceed *in forma pauperis*

1) Prisoner seeking leave to proceed without prepayment must submit

§ 801.02(7)(c)

a. Proof of exhaustion, including appeals

§ 814.29(1)(b)

b. Affidavit of indigency

§ 814.29(1m)(b)2.

c. Certified copy of 6-month trust fund account statement including the prisoner's release account

§ 814.29(1m)(c)2.

d. Authorization to deduct fees from prison account

St ex rel Locklear v Schwarz
2001 WI App 74
¶¶ 22, 28
242 Wis. 2d 327

e. Certification from Dept of Justice regarding number of strikes (litigation dismissals) that prisoner has accumulated

St ex rel Locklear v Schwarz
2001 WI App 74, ¶ 22
242 Wis. 2d 327

2) Absence of any one of these requirements can lead to Ct's rejection of petition

§ 893.735
St ex rel Walker v McCaughtry
2001 WI App 110, ¶ 12
244 Wis. 2d 177
see also St ex rel Tyler v Bett
2002 WI App 234
257 Wis. 2d 606

3) Prisoner seeking waiver of fees must submit all five required items "before the forty-five-day filing deadline is tolled"

§ 801.02(7)(d)

4) Prisoner may not proceed without prepayment of fees if on 3 or more prior occasions prisoner had a State or Federal Ct action or appeal dismissed for reasons listed under § 802.05(4)(b)1.–4. (three-strikes rule)

§ 801.02(7)(d)
RMC Forms CV-440, CV-441

a. Except Ct may permit action if prisoner in imminent danger of serious physical injury

St ex rel Khan v Sullivan
2000 WI App 109
235 Wis. 2d 260;
see also Lewis v Sullivan
279 F3d 526, 528
(7th Cir 2002)

b. Constitutionality of three-strikes provision upheld

RMC Form CV-443

5) Fee payment schedule

§ 814.29(1m)(d)

a. Ct orders an initial partial filing fee equal to the balance in the prisoner's trust fund account

§ 814.29(1m)(e)

b. Prisoner's trust fund account is frozen until sufficient funds are accumulated to pay the balance of the fees

St ex rel Akbar v Kronzer
2004 WI App 108, ¶ 3
273 Wis. 2d 749
Spence v Cooke
222 Wis. 2d 530
(Ct. App. 1998)

c. DOC may draw from either the general account or release account to pay fees. "Fees" include transcript costs

St ex rel Coleman
v Sullivan
229 Wis. 2d 804
(Ct. App. 1999)

d. Ct order required to use release account funds

6) Appeal of fee waiver decision

St ex rel Staples v DHSS
130 Wis. 2d 285
(Ct. App. 1986)

a. No direct appeal from denial of leave to file without prepayment of fees

St ex rel Hansen v Cir Ct
181 Wis. 2d 993
(Ct. App. 1994)

b. Review through supervisory writs

E. PLRA's mandatory screening of all civil prisoner litigation

§ 802.05(4)
St ex rel Adell v Smith
2001 WI App 168, ¶ 4 n3
247 Wis. 2d 260

1) Ct shall review the initial pleading in all prisoner cases as soon as practicable after either the fee is paid or, in the case of an indigent prisoner, a payment waiver was granted

§ 802.05(4)(b)
St ex rel Schatz
v McCaughtry
2003 WI 80
263 Wis. 2d 83
RMC Form CV-444

2) Ct may sua sponte dismiss without requiring a response if the action

a. Is frivolous

b. Is used for improper purpose (harassment, delay)

c. Seeks damages from immune Def; or

d. Fails to state a claim upon which relief may be granted

St ex rel Schatz v McCaughtry
2003 WI 80, ¶ 6
263 Wis. 2d 83

- Case filed after the applicable statute of limitation fails to state a claim upon which relief can be granted

St ex rel Freeman v Berge
2002 WI App 213, ¶ 13
257 Wis. 2d 236

- Prisoner's failure to plead exhaustion is failure to state a claim upon which relief can be granted

§ 801.02(7)(d)

e. Is brought by a prisoner with "three strikes" (See **Sec. 1.D.**4) above)

St ex rel Luedtke v Bertrand
220 Wis. 2d 574, 585–87
(Ct. App. 1998)
affd by equally divided ct, 226 Wis. 2d 271 (1999)

3) Ct reviews petition under liberal motion to dismiss standards

4) Due-process consideration for sua sponte dismissals

St ex rel Schatz v McCaughtry
2003 WI 80
263 Wis. 2d 83
(interpreting former § 802.05(3) (1999–2000))

a. Sua sponte dismissals for failure to state a claim upon which relief may be granted do not violate due process. Sec. 802.05(4) provides constructive notice of the potential for such dismissal; Ct therefore is not obligated to give the prisoner litigant notice of Ct's intent to dismiss or any opportunity to be heard before dismissing for failure to state a claim

St ex rel Kaufman v Karlen
2005 WI App 14, ¶ 9
278 Wis. 2d 332

b. However, it does violate due process to dismiss on the merits without first receiving a complete record of the administrative proceedings and briefs submitted by parties

§ 802.05(4)(d)
§ 809.103(3)

5) Dismissal of an action or appeal does not relieve prisoner from paying the full filing fee

St ex rel Henderson v Raemisch
2010 WI App 114
329 Wis. 2d 109

6) Dismissal of claim or claims within suit that proceeded on one or more viable claims does not constitute dismissal of action within meaning of PLRA's three-strikes provision; to constitute a strike, entire action must be dismissed

§ 804.015

F. Discovery

1) Unless ordered by Ct, no discovery before answer

2) No discovery pending motions to dismiss and motions for summary judgment unless Ct decides reasonable opportunity to prevail on the merits

3) Discovery narrowly tailored to provide minimal intrusion

4) Limit of 15 requests for interrogatories, production of documents, or admissions, unless good cause shown

5) Limits not applicable if prisoner represented by Atty

§ 807.15
St ex rel Garel v Morgan
2000 WI App 223
239 Wis. 2d 8

G. Mandatory release extensions

1) Ct may extend a prisoner's mandatory release date if

a. Action (including certiorari proceeding) was filed for malicious purposes

b. Action (including certiorari proceeding) was filed for harassment purposes; or

c. Prisoner submits false testimony or evidence

§ 807.04(2)

H. Hearings to be conducted electronically

If official having custody of prisoner agrees

I. Atty fees and costs; security for costs

Johnson v Daley
339 F3d 582
(7th Cir 2003)

1) Reduced Atty fees awardable to prevailing plaintiff prisoner under PLRA do not deny equal protection

§ 814.25(2)
St ex rel Harr v Berge
2004 WI App 105
273 Wis. 2d 481

2) Limitation on prisoner's recovery of costs in action against State, State agency, or Cty, city, village, or town, or against any individual Def when sued in official capacity does not deny equal protection

§ 895.46(1)(am)

3) Mandatory costs awarded to prevailing governmental Def

§ 814.02
Schmidt v
City of Kenosha
214 Wis. 2d 527, 540 n2
(Ct. App. 1997)

4) Maximum amount of Atty fees in certiorari is $100

§ 814.25(3)

5) If State prevails in action relating to jail or prison conditions, the prisoner shall pay the full costs allowed under Ch 814

§ 814.25(3)
§ 814.29(1m)(e)

6) Inmate ordered to pay costs to prevailing Def will have costs paid to the Def in the same manner as filing fees are taken from inmate accounts

§ 814.29(1m)(b), (c)

7) Only inmates who are indigent under the Wis PLRA may proceed without being required to post security for costs

§ 814.27

8) Ct may sua sponte require inmate to post security for costs

§ 814.28
St ex rel Firemen's Fund
Ins Co v Hoppmann
207 Wis. 481 (1932)

9) Inmate shall be ordered to post security for costs on Def's motion if inmate has funds

§ 814.28(2)

10) When inmate ordered to post security for costs, all proceedings are stayed until security is posted

§ 814.29(3)(b)

11) Inmate litigants give implied consent to have defense costs deducted from their accounts

St ex rel Steldt
v McCaughtry
2000 WI App 176, ¶ 15
239 Wis. 2d 393
St ex rel Coleman
v Sullivan
229 Wis. 2d 804, 809
(Ct. App. 1999)

12) Ct order is required for release of account funds to be accessed

St ex rel Korne v Wolke
79 Wis. 2d 22 (1977)

13) Costs are generally not awardable in a habeas action

§ 802.05
See St ex rel Haas
v McReynolds
2002 WI 43
252 Wis. 2d 133

14) However, frivolous costs may be awardable in a habeas action

§ 806.025

J. If money judgment is awarded in favor of prisoner, numerous debts must be paid, in the order specified in paras. 1)–6) below, before any funds can be transferred to prisoner

§ 806.025(2)(a)

1) Judgment must be used to pay unpaid order of restitution against the prisoner and any other civil judgment in favor of a victim of a crime committed by the prisoner

NOTE: If the amount of the monetary award is insufficient to pay of these unpaid orders and judgments, the orders and judgments shall be paid based on the length of time they have existed, the oldest order being paid first.

§ 806.025(2)(am)
§ 949.001–.18

2) If money remains after payment of all unpaid restitution orders and judgments in favor of a victim, reimbursement to the DOJ for a crime victim's award made under Subch I of Ch 949

§ 806.025(2)(at)

3) If money remains after the reimbursement to DOJ, money shall be used to pay any child or family support owed by the prisoner

§ 806.025(2)(b)

4) If money remains after the payment of child or family support, money shall be used to pay Ct costs or filing fees previously assessed against the prisoner by a state Ct that remains unpaid, with the oldest costs or fees being paid first

§ 806.025(2)(c)

5) If money remains after the payment of all Ct costs or filing fees, money shall be used to pay any unpaid litigation loan, as defined in § 301.328(1)

§ 806.025(2)(d)

6) If any money remains after the payments referred to above, Ct shall request that DOC make a reasonable effort to notify any victims of the crime for which the prisoner is convicted and imprisoned, incarcerated, or confined of the pending payment of a monetary award to the prisoner. DOC shall inform Ct of whether any victims were notified. Ct shall withhold any payment to the prisoner for a reasonable time after DOC notifies Ct that a victim was notified so that the victim may have time to petition Ct regarding payments to that victim from the remaining money

§ 806.025(2)(e)

7) Any remaining money will be paid to the prisoner

2. Pleadings by Self-Represented Litigants

Booth v Churner
121 S. Ct. 1819 (2001)
Haines v Kerner
92 S. Ct. 594, 596 (1972)

A. Ct must construe pleadings by self-represented (pro se) litigants liberally

bin-Rilla v Israel
113 Wis. 2d 514, 520–23
(1983)
St ex rel Staples v DHSS
130 Wis. 2d 285, 288
(Ct. App. 1986)

1) Wis Cts look beyond label affixed by prisoner, relabeling the pleadings if necessary

State ex rel Harris
v Smith
220 Wis. 2d 158, 164–65
(Ct. App. 1998)

2) However, the obligation to liberally construe a self-represented litigant's pleading assumes that the litigant has otherwise made a proper argument for relief; it does not extend to creating an issue or making an argument for the litigant

3) For general discussion of actions under 42 USC § 1983, see **CV 44**

SCR 70.40

3. Venue

SCR 70.40(2)(g)

A. Ct in Cty where action filed shall determine whether venue proper

§ 801.50(2)(a)

1) Except as otherwise provided, venue in civil action in Cty where claim arose

§ 801.50(3)(c)

2) When sole Def is State or State employee, and plaintiff is prisoner, venue in Dane Cty unless other venue specifically authorized

But actions relating to validity or invalidity of rule must be venued as provided in § 227.40(1)

Bin-Rilla v Israel
113 Wis. 2d 514 (1983)

3) Action seeking relief from conditions of confinement shall be venued in Cty where prisoner is confined

§ 801.50(4)(a)

4) Habeas corpus action seeking relief from judgment of conviction shall be venued in Cty of conviction

§ 801.50(4)(b)

5) Habeas corpus action seeking relief from restraint of prisoner's liberty in any respect other than judgment of conviction shall be venued in Cty of confinement

§ 801.50(5)

6) Certiorari review of revocation of probation, extended supervision, or parole; of a denial under § 302.113(9g) of a petition for modification of a sentence; or of denial of parole shall be venued in Cty where relator last convicted of offense causing incarceration

SCR 70.40(3)

B. Ct on its own motion shall change venue to more convenient Cty under § 801.52 if all of following answered in affirmative:

SCR 70.40(2)(h)

1) Whether venue also proper in another Cty

SCR 70.40(2)(i)

2) Whether an evidentiary hearing likely to be needed, and

SCR 70.40(2)(j)

3) Whether other Cty is more convenient for parties and witnesses

SCR 70.40(4)

C. If receiving Ct believe error made, matter to be referred to Chief Judge

4. Certiorari

(For more complete procedural discussion see **Certiorari**, CV 26, and **Writs**, CR 46)

A. Commencement of action

§ 801.02(7)(b)
St ex rel Braun v Krenke
146 Wis. 2d 31, 39
(Ct. App. 1988)
Moore v Stahowiak
212 Wis. 2d 744
(Ct. App. 1997)

1) Exhaustion of administrative remedies generally required

St ex rel Mentek
v Schwarz
2001 WI 32
242 Wis. 2d 94

However, exhaustion requirement does not apply to prisoner seeking certiorari review of decision of Department of Administration (Division of Hearings and Appeals) to revoke probation

§ 801.02(7)(bm)2.

2) Notice of claim under § 893.82(3) not required in common-law certiorari action

§ 893.735

3) 45-day statute of limitation in certiorari action

a. However, following tolling rules apply

St ex rel Steldt
v McCaughtry
2000 WI App 176
238 Wis. 2d 393

- From time Clerk of Ct receives petition

- From time prisoner asks prison for fee disbursement

St ex rel Shimkus v
Sondalle (Shimkus I)
2000 WI App 238
239 Wis. 2d 327
St ex rel Shimkus v
Sondalle (Shimkus II)
2000 WI App 262
240 Wis. 2d 310

- From time prisoner places petition in prison mailbox

Mitchell v Buesgen
2024 WI App 14

411 Wis. 2d 269
pet for rev denied

- Prisoner must have included all required waiver paperwork under prisoner's control within the 45 days

St ex rel Smith v McCaughtry
222 Wis. 2d 68, 78–79
(Ct. App. 1998)

b. 45-day statute of limitation tolled to permit inmate to administratively challenge procedural error in prison disciplinary matters

St ex rel Tyler v Bett
2002 WI App 234, ¶ 17
257 Wis. 2d 606
St ex rel MacMillan v Carr, Nos 2022AP1592, 2022AP1662, 2024 WL 122527, ¶¶ 26–30
(Wis. Ct. App. 1/11/2024)
(unpublished opinion not citable per § 809.23(3))
pet for rev denied

c. Inadequate legal resources or library access at the institution not grounds for tolling

St ex rel Grzelak v Bertrand
2003 WI 102, ¶ 30
263 Wis. 2d 678
Wis Adm Code § DOC § 303.82(4)

4) In prison disciplinary matter, warden's decision is final on substantive issues such as sufficiency of evidence, and warden must be named as a respondent

St ex rel Grzelak v Bertrand
2003 WI 102, ¶ 14
263 Wis. 2d 678
Wis Adm Code
§§ DOC 310.06(2), DOC 310.13

5) Inmate must challenge procedural errors in disciplinary matters through Inmate Complaint Review System, and DOC Secretary must be named as a respondent

Drow v Schwarz
225 Wis. 2d 362 (1999)

6) Proceedings seeking certiorari review of a probation revocation decision may be heard in any branch of the Circuit Ct in Cty in which conviction was originally entered

B. Sua sponte dismissal. *See supra* Sec. 1.E.2)

C. Three ways to commence. See CV 26, Sec. 4.C.

D. Traditional standards for certiorari. See CV 26, Sec. 5

E. Standard of review. See CV 26, Sec. 6.B.

F. Requirements for remedy. See CV 26, Sec. 6.C.

G. Remedy will not lie, when. See CV 26, Sec. 6.D.

H. Review of out-of-state prison discipline

St ex rel Barksdale
v Litscher
2004 WI App 130
275 Wis. 2d 493

1) Preclusion principles bar relitigating a foreign state Ct's final judgment on the merits

St ex rel Ponchik
v Bradley
2004 WI App 226
277 Wis. 2d 768

2) In order for state prisoner to litigate out-of-state discipline in Wis Ct, inmate must prove that foreign state Ct refused to hear case because of lack of jurisdiction or competency

St ex rel Myers
v Swenson
2004 WI App 224
277 Wis. 2d 749

This requirement does not violate equal protection

St ex rel Myers
v Swenson
2004 WI App 224, ¶ 9 n.2
277 Wis. 2d 749

3) Although a foreign state's law controls as to conditions of confinement and disciplinary matters, Wis retains jurisdiction over inmate's sentence and sentence credits

I. Record on review

St ex rel Irby v Israel
95 Wis. 2d 697
(Ct. App. 1980)

1) Review limited to the record

St ex rel Gray v
Common Council
104 Wis. 622 (1899)
St ex rel Hoover
v Gagnon
124 Wis. 2d 135 (1985)

2) Supplementation of record

§ 781.03

3) Transmittal of prison record

St ex rel Whiting v Kolb
158 Wis. 2d 226, 233

(Ct. App. 1990)

J. Standard of review

St v St ex rel Campbell
156 Wis. 2d 329, 333
(Ct. App. 1990)

Deference to prison officials

Wis Adm Code
§§ DOC 303.65–.90

K. Review of disciplinary process

Saenz v Murphy
162 Wis. 2d 54, 63 (1991)
Santiago v Ware
205 Wis. 2d 295
(Ct. App. 1996)

1) Prisoner must timely object to procedural error at the disciplinary hearing and through the administrative appeal process

St ex rel Anderson-El
v Cooke
2000 WI 40
234 Wis. 2d 626

a. General rule does not apply when DOC violates own regulations and fails to give inmate notice of proceedings

b. General rule does not apply to right to call witnesses

Wis Adm Code
§ DOC 303.80

2) Written notice

St ex rel Klinke v DHSS
87 Wis. 2d 110
(Ct. App. 1978)
St ex rel Hoover
v Gagnon
124 Wis. 2d 135 (1985)

3) Waiver of formal hearing

Wis Adm Code
§ DOC 303.80(3)

4) Timeliness of hearing

St ex rel Staples v Young
142 Wis. 2d 348
(Ct. App. 1987)
St ex rel Meeks v Gagnon
95 Wis. 2d 115
(Ct. App. 1980)

5) Adjustment committee's statement of reasons

St ex rel Johnson v Cady
50 Wis. 2d 540, 550
(1971)

a. Presume committee had sufficient information to support its decision

Saenz v Young
811 F2d 1172
(7th Cir 1987)

b. Reliance on the conduct report

St ex rel Gunsolus
v Young
140 Wis. 2d 738
(Ct. App. 1987)
St ex rel Irby v Israel
95 Wis. 2d 697
(Ct. App. 1980)
Wis Adm Code
§ DOC 303.84

6) Witnesses

St ex rel Hoover
v Gagnon
124 Wis. 2d 135 (1985)

a. No confrontation

St ex rel Gunsolus
v Young
140 Wis. 2d 738
(Ct. App. 1987)

b. No right to call if hearing for minor violations

Hamlin v Vaudenberg
95 F3d 580
(7th Cir 1996)
St ex rel Hoover
v Gagnon
124 Wis. 2d 135, 149–50
(1985)
St ex rel Staples v DHSS
115 Wis. 2d 363 (1983)
Wis Adm Code
§ DOC 303.84(5)

c. Confidential informants

St ex rel Whiting v Kolb
158 Wis. 2d 226
(Ct. App. 1990)

7) Evidence of guilt

Santiago v Ware
205 Wis. 2d 295
(Ct. App. 1996)

a. Some evidence test

St ex rel Ortega
v McCaughtry
221 Wis. 2d 376, 386–87
(Ct. App. 1998)

b. Substantial evidence test

St ex rel Meeks v Gagnon
95 Wis. 2d 115
(Ct. App. 1980)

Wis Adm Code
§ DOC 303.83

8) Staff representative's (formerly the advocate's) report/testimony

St ex rel Ortega
v McCaughtry
221 Wis. 2d 376
(Ct. App. 1998)

a. Staff advocate's performance is "only collateral to the conduct of disciplinary proceedings themselves"

Wis Adm Code
§ DOC 303.88

9) Harmless error

St ex rel Staples v DHSS
136 Wis. 2d 487
(Ct. App. 1987)
Wis Adm Code
Ch DOC 310

L. Review of the inmate complaint review system

St ex rel Riley v DHSS
151 Wis. 2d 618
(Ct. App. 1989)
Wis Adm Code
§ DOC 303.10

M. Review of inmate's placement in temporary lockup

Casteel v McCaughtry
176 Wis. 2d 571 (1993)

1) Wis Adm Code § DOC 303.10 does not create a liberty interest protected by the 14th Amendment

Townsend v Fuchs
522 F3d 765, 771–72
(7th Cir 2008)

2) Placement in temporary lockup does not implicate 14th Amendment liberty interest

Marion v Columbia
Correctional Inst
559 F3d 693, 697
(7th Cir 2009)

3) However, the duration of segregation, together with the conditions of segregation, may trigger a liberty interest

St ex rel Riley v DHSS
151 Wis. 2d 618
(Ct. App. 1989)
Wis Adm Code
Ch DOC 308

N. Review of inmate's placement in administrative confinement

Coleman v Percy
96 Wis. 2d 578 (1980)
St ex rel Tyznik v DHSS
71 Wis. 2d 169 (1976)

O. Review of parole denial

St ex rel Parker
v Sullivan
184 Wis. 2d 668 (1994)

P. Review of mandatory release date

St v Williams
2018 WI App 20, ¶ 4
380 Wis. 2d 440

Q. Deduction of restitution from inmate accounts

R. Remedies

Irby v Bablitch
170 Wis. 2d 656
(Ct. App. 1992)

1) Reverse and expunge

St ex rel Lomax v Leik
154 Wis. 2d 735, 741
(Ct. App. 1990)
St ex rel Irby v Israel
95 Wis. 2d 697, 708–09
(Ct. App. 1980)

2) Remand

St ex rel Markovic
v Litscher
2018 WI App 44
383 Wis. 2d 576
Coleman v Percy
86 Wis. 2d 336, 341
(Ct. App. 1978)

3) Damages not recoverable

5. Mandamus

St ex rel Staples v DHSS
130 Wis. 2d 285
(Ct. App. 1986)

(See "Mandamus," **CV 28**)

§ 801.02(7)(b)
Moore v Stahowiak
212 Wis. 2d 744
(Ct. App. 1997)

A. Exhaustion of administrative remedies required

§ 19.37(1)

B. Public records request (See CV 28, Sec. 8)

§ 19.32(3)

1) "Requester." *Not* incarcerated person unless

a. Record pertains to him or her or

b. Record pertains to his or her minor children

§ 19.35(3)(f)

2) The records custodian may require prepayment of fees if the prisoner has failed to pay previously imposed fees

§ 19.37(2)(a)

3) No mandatory/minimum damages if the requester is an incarcerated person

6. Habeas Corpus

(See **Habeas Corpus**, CV 27, and **Writs**, CR 46)

§ 227.40(2)(d)

A. Habeas corpus used to review an administrative rule relating to criminal prosecution

St ex rel Clifton v Young
133 Wis. 2d 193
(Ct. App. 1986)

Policy for calculating good time relates to criminal prosecution

St ex rel Richards v Leik
175 Wis. 2d 446, 454
(Ct. App. 1993)

B. Habeas corpus is proper remedy for inmate who seeks to shorten time of imprisonment, but not if inmate seeks transfer to less restricted form of custody

Wilkinson v Austin
125 S. Ct. 2384, 2394–95
(2005)
Townsend v Fuchs
522 F3d 765, 772
(7th Cir 2008)

1) US Supreme Ct's *Wilkinson* decision did not determine that conditions in the Supermax prison created a liberty interest by themselves; it relied on additional factors of indefinite placement and loss of parole

Marion v Columbia Correctional Inst
559 F3d 693, 697
(7th Cir 2009)

2) However, the duration of segregation, together with the conditions of segregation, may trigger a liberty interest

St ex rel Reddin v Galster
215 Wis. 2d 179
(Ct. App. 1997)

C. Not available when other adequate legal remedies exist

1) E.g., Probation revocation appeals (must be by certiorari)

Exception: claims of ineffective assistance of counsel in revocation proceedings

2) Even when the statutes of limitation for those remedies have passed

7. Declaratory Judgment

Richards v Young
150 Wis. 2d 549 (1989)
Harris v Reivitz
142 Wis. 2d 82
(Ct. App. 1987)

A. Service upon the Joint Committee for Review of Administrative Rules

§ 893.82(3m)
§ 801.02(7)(bm)

B. Prisoner must file notice of claim under § 893.82(3) when seeking declaratory judgment

§ 801.02(7)(b)
St ex rel Hensley v Endicott
2001 WI 105
245 Wis. 2d 607

C. PLRA exhaustion requirement trumps the declaratory judgment statute governing procedures for contesting the validity of administrative rules, even when constitutional challenge raised

18 USC § 3626(a)(1), (2)

8. Injunctive Relief

§ 893.82(3m)

A. No notice of claim, under § 893.82(3), required if Ct finds substantial risk to prisoner's health or safety

§ 813.02(1)(c)1.
§ 813.40(1)(b)

B. Temporary injunctions

1) Ct to give AG notice and opportunity to be heard

§ 813.02(1)(c)2.

2) Ct must consider adverse impact on public safety and operation of jail or prison involved

§ 813.02(1)(c)2.
§ 813.40(1)(b)

3) Injunction must

a. Require only what is necessary to correct harm and

b. Be least intrusive means of accomplishing purpose

c. Not require or permit governmental employee, agent, or official to exceed authority or violate state law or ordinance unless specified exception applies

§ 813.02(1)(c)3.

4) Expires after 90 days

C. Permanent injunctions and consent decrees

§ 813.40(2)

1) Ct must consider adverse impact on public safety and operation of jail or prison involved

§ 813.40(1)(b), (d)

2) Injunction must

a. Require only what is necessary to correct harm

b. Be least intrusive means of accomplishing purpose

c. Not require or permit governmental employee, agent, or official to exceed authority or violate state law or ordinance unless specified exception applies

§ 813.40(3)

3) 2-year limitation

§ 813.40(5), (6)

4) Ct restricted in ordering construction of prisons and release of prisoners

9. Tort Claims Against State Actors

§ 893.82(3), (3m)

A. Inmate is required to serve a notice of claim under § 893.83(3)

§ 893.82(3), (3m)
Modica v Verhulst
195 Wis. 2d 633, 647
(Ct. App. 1995)
Protic v Castle Co
132 Wis. 2d 364, 369
(Ct. App. 1986)

B. Def must be specifically identified by name in the notice of claim

§ 801.02(7)(b)

C. Exhaustion of administrative remedies required

CL v Olson
143 Wis. 2d 701, 717–18
(1988)
Kimps v Hill
187 Wis. 2d 512, 513
(Ct. App. 1994)
aff'd, 200 Wis. 2d 1
(1996)

D. Only liability when

1) Officer's duty is ministerial,

2) There exists a known present danger of such force that time, mode, and occasion for performance is evident with such certainty that nothing remains for exercise of judgment and discretion, or

3) Public officer's challenged decision involves exercise of discretion but the discretion exercised is not governmental, i.e., does not require application of statutes to facts or subjective evaluation of law

Holzworth v St
238 Wis. 63, 66 (1941)
Robinson v Rohr
73 Wis. 436, 442 (1888)

E. Person liable only for his or her own torts; no respondeat superior in cases against State actors

42 USC § 1997e(e)
18 USC § 2246

F. Physical injury (or commission of a sexual act) must be proved

§ 895.455

No action may be brought by an inmate for mental or emotional injury suffered while in custody unless prisoner has proved he or she suffered a physical injury

10. Civil Rights Claims

A. Civil rights statutes

Benson v Cady
761 F2d 335
(7th Cir 1985)

1) 42 USC § 1983

See **CV 44** **(Sec. 1983 Actions)**

Patterson v
McLean Credit Union
109 S. Ct. 2363 (1989)

2) 42 USC § 1981

Bell v City of Milwaukee
746 F2d 1205
(7th Cir 1984)
overruled by
Russ v Watts
414 F3d 783
(7th Cir 2005)

3) 42 USC § 1985(2)

Bray v Alexandria
Women's Health Clinic
113 S. Ct. 753 (1993)

4) 42 USC § 1985(3)

Terry v Kolski
78 Wis. 2d 475, 482
(1977)

B. Concurrent jurisdiction of State Cts

Irby v Young
139 Wis. 2d 279
(Ct. App. 1987)

Venue

C. Exhaustion of administrative remedies required

See **CV 44, Sec. 2.D.**

D. Immunity

Butz v Economou
98 S. Ct. 2894 (1978)
Pierson v Ray
87 S. Ct. 1213 (1967)
See § 893.80(4), and
Lifer v Raymond
80 Wis. 2d 503, 512
(1977)

1) Judicial immunity for persons performing adjudicatory function

Koutnik v Brown
351 FSupp2d 871, 877
(WD Wis 2004)
Borzych v Frank
340 FSupp2d 955,
963–65 (WD Wis 2004)

This principle extends to inmate complaint examiners making recommendations for disposition of complaints

US ex rel Powell v Irving
684 F2d 494
(7th Cir 1982)
Walker v
Prisoner Review Bd
769 F2d 396
(7th Cir 1985)

2) Parole Commission immunity

Imbler v Pachtman
96 S. Ct. 984 (1976)
John v Barron
897 F2d 1387, 1391
(7th Cir 1990)
Burns v Reed
111 S. Ct. 1934 (1991)
Ford v Kenosha Cty
160 Wis. 2d 485 (1991)

3) Prosecutorial immunity

4) Immunity for probation and parole officers

Copus v City of Edgerton
151 F3d 646, 649–50
(7th Cir 1998)

a. Issuing detainers

Demoran v Witt
781 F2d 155, 157–58

(9th Cir 1986)

b. Presentence reports

Harlow v Fitzgerald
102 S. Ct. 2727 (1982)
Barnhill v
Bd of Regents
166 Wis. 2d 395 (1992)

5) Qualified immunity

Anderson v Creighton
107 S. Ct. 3034 (1987)

a. "Objective legal reasonableness of the action" assessed in light of the legal rules that were clearly established at the time it was taken

Anderson v Creighton
107 S. Ct. 3034 (1987)

b. Limits discovery to facts relevant to qualified immunity. Must be tailored specifically to the question

Mitchell v Forsyth
105 S. Ct. 2806, 2815–16
(1985)
Powell v Cooper
2001 WI 10, ¶¶ 15–17
241 Wis. 2d 153

c. Order denying qualified immunity is immediately appealable. In Wisconsin, however, it is appealable as of right at summary-judgment stage but only appealable by permission at motion to dismiss stage

Cleavinger v Saxner
106 S. Ct. 496 (1985)

d. Disciplinary committee members

E. Personal involvement

Wolf-Lillie v Sonquist
699 F2d 864, 869
(7th Cir 1983)
Crowder v Lash
687 F2d 996
(7th Cir 1982)

1) Claim under 42 USC § 1983 may not be predicated on a theory of respondeat superior

Rascon v Hardiman
803 F2d 269
(7th Cir 1986)
Oklahoma City v Tuttle
105 S. Ct. 2427 (1985)
St Louis v Praprotnik
108 S. Ct. 915 (1988)

2) Supervisory officials must knowingly, willfully, or at least recklessly cause the alleged deprivation by action or failure to act

F. Retaliation

Abel v Miller
824 F2d 1522, 1534–35

(7th Cir 1987)
Buise v Hudkins
584 F2d 223, 229–30
(7th Cir 1978)

1) Prison officials may not retaliate against inmate for exercise of protected rights, even if retaliation is in guise of otherwise proper conduct

Mt Healthy
City Sch Dist v Doyle
97 S. Ct. 568 (1977)

2) Must have causation between retaliation and harm

Matzker v Herr
748 F2d 1142, 1150–51
(7th Cir 1984)

3) Retaliation actionable even if Def's act might have been proper if taken for different reasons

11. Selected Civil Rights Issues

Pell v Procunier
94 S. Ct. 2800 (1974)

A. First Amendment

1) Mail

Procunier v Martinez
94 S. Ct. 1800 (1974)

a. Restrictions on outgoing mail must further an important governmental interest unrelated to suppression of expression and be no greater than necessary to protect those interests

Thornburgh v Abbott
109 S. Ct. 1874 (1989)
Turner v Safley
107 S. Ct. 2254 (1987)
Williams v Lane
851 F2d 867, 877
(7th Cir 1988)
see also Beard v Banks
126 S. Ct. 2572, 2580
(2006)

b. Restrictions on incoming mail valid if reasonably related to legitimate penological interest. Whether a restriction is reasonable determined by a four-part balancing test

Lomax v Fiedler
204 Wis. 2d 196
(Ct. App. 1996)

- Whether there is a "valid, rational connection" between the regulation and the governmental interest justifying it
- Whether there are alternative means of exercising the right that remain open to inmates
- Whether accommodation of the asserted right will have an impact on guards and other inmates and prison operations generally, and

- Whether ready alternatives to the regulation or action exist

Taylor v Sterrett
532 F2d 462
(5th Cir 1976)
Bach v Illinois
504 F2d 1100
(7th Cir 1974)
St ex rel Peckham v Krenke
229 Wis. 2d 778
(Ct. App. 1999)

c. Legal correspondence may not be read, but may be opened and inspected

Aikens v Jenkins
534 F2d 751
(7th Cir 1976)
Rios v Lane
812 F2d 1032
(7th Cir 1987)

d. Burden of justifying censorship falls on the prison

Jones v NC Prisoners' Labor Union, Inc
97 S. Ct. 2532 (1977)

2) Restriction of association

Jones v NC Prisoners' Labor Union, Inc
97 S. Ct. 2532 (1977)

a. Prisoners have no associational right to form a prisoners' union

Hewitt v Helms
103 S. Ct. 864 (1983)

b. Prisoners have no constitutional right to any particular visitor

Block v Rutherford
104 S. Ct. 3227 (1984)
Barnett v Centoni
31 F3d 813, 817
(9th Cir 1994)

c. Prisoners have no constitutional right to contact visitation

3) Religion

a. Constitutional analysis

Cruz v Beto
92 S. Ct. 1079 (1972)
Bell v Wolfish
99 S. Ct. 1861 (1979)

- Must be sincerely held and rooted in religious belief, not purely secular or philosophical

O'Lone v Est of Shabazz
107 S. Ct. 2400 (1987)

- Restrictions on the practice of religion must be reasonably related to legitimate penological interests. Reasonableness is determined by a four-part balancing test

Kaufman v McCaughtry
419 F3d 678
(7th Cir 2005)

- Atheism is protected under freedom of religion

City of Boerne v Flores
117 S. Ct. 2157 (1997)

b. Religious Freedom Restoration Act of 1993 (RFRA) found unconstitutional as to the States and their subdivisions

42 USC § 2000cc-1(a)
Cutter v Wilkinson
125 S. Ct. 2113 (2005)
Charles v Verhagen
348 F3d 601
(7th Cir 2003)

c. Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits governmental imposition of a "substantial burden on the religious exercise" of an inmate, unless the Def can show burden is (1) in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling interest

Koger v Bryan
523 F3d 789, 799
(7th Cir 2008)

- Governmental conduct is substantially burdensome under RLUIPA when it places substantial pressure an adherent to modify his behavior and violate his beliefs

Cutter v Wilkinson
125 S. Ct. 2113 (2005)

- RLUIPA not an Establishment Clause violation but a permissible accommodation of religion justified by the fact that the government itself had severely burdened prisoner's religious rights through the act of incarceration

Vinning-El v Evans
657 F3d 591, 593
(7th Cir 2011)

- A personal religious faith is entitled to as much protection as one espoused by an organized group

Nelson v Miller
570 F3d 868
(7th Cir 2009)

- Under RLUIPA, even if the majority of the person's identified religion do not ascribe to the belief, the practice can still be protected if prisoner holds a sincere belief

4) Name changes

Williams v Racine Cty
Cir Ct
197 Wis. 2d 841
(Ct. App. 1995)

The State's interest in being able to identify inmates by the names under which they were convicted and sentenced generally outweighs the inmate's interest in changing his or her name. This applies even when the inmate wishes to

change his or her name for religious reasons

B. Fourth Amendment

Hudson v Palmer
104 S. Ct. 3194 (1984)

1) No expectation of privacy in living quarters

Bell v Wolfish
99 S. Ct. 1861 (1979)
Peckham v WI DOC
141 F3d 694
(7th Cir 1998)

2) Standard governing strip searches is reasonableness

Florence v Bd of Chosen Freeholders
132 S. Ct. 1510 (2012)

3) Officials may strip-search pretrial arrestee as part of intake process before admission to jail, even if no reason to suspect that person is carrying contraband

Al Ghashiyah v McCaughtry
230 Wis. 2d 587, 605
(Ct. App. 1999)

4) Inmate in segregation has no 4th Amendment right of privacy that protects him from visual inspection and strip search

US v Clark
651 FSupp 76, 80–81
(MD Pa 1986)
aff'd without op
857 F2d 1466 (3d Cir 1988), 872 F2d 414 (3d Cir 1989)
Rodriguez v Blaedow
497 FSupp 558
(DC Wis 1980)
St v Riley
2005 WI App 203
287 Wis. 2d 244

5) Monitoring and recording telephone calls between inmates and private citizens from prison telephones is constitutional

Green v Berge
354 F3d 675
(7th Cir 2004)
Shelton v Gudmanson
934 FSupp 1048
(WDWI 1996)

6) The taking of tissue samples for Wisconsin's DNA data bank does not violate 4th Amendment

Rhodes v Chapman
101 S. Ct. 2392 (1981)
Wilson v Seiter
111 S. Ct. 2321 (1991)
Hudson v McMillian
112 S. Ct. 995 (1992)

C. Eighth Amendment

Whitley v Albers
106 S. Ct. 1078 (1986)
Kinney v Ind Youth Ctr
950 F2d 462
(7th Cir 1991)

1) Eighth Amendment applies only to those convicted of crimes

2) Two-part test: To prevail on an 8th Amendment challenge, a prisoner must satisfy both an objective test (Was the deprivation sufficiently serious?), and a subjective test (Did the official act with a sufficiently culpable state of mind?)

Hudson v McMillian
112 S. Ct. 995 (1992)
French v Owens
777 F2d 1250
(7th Cir 1985)

3) Living conditions must involve "wanton and unnecessary infliction of pain" or result in unquestioned and serious deprivation of basic human needs. "Extreme deprivations" are required to make out a conditions of confinement claim

Estelle v Gamble
97 S. Ct. 285 (1976)
Wellman v Faulkner
715 F2d 269
(7th Cir 1983)

4) Medical care

Duane v Lane
959 F2d 673
(7th Cir 1992)
Duckworth v Franzen
780 F2d 645, 653
(7th Cir 1985)

a. To sustain 8th Amendment claim, prisoner must show Def was deliberately indifferent

Estelle v Gamble
97 S. Ct. 285 (1976)
Abdul-Wadood v Nathan
91 F3d 1023, 1024–25
(7th Cir 1996)

- Medical negligence is not deliberate indifference

Langston v Peters
100 F3d 1235, 1240
(7th Cir 1996)
Murphy v Walker
51 F3d 714, 717
(7th Cir 1995)

- Mere delay in providing treatment is not deliberate indifference

- Deliberate indifference is not negligence. Prison official must actually wish inmate harm or at least be totally unconcerned with the prisoners

Brownelli v McCaughtry
182 Wis. 2d 367
(Ct. App. 1994)

- Jailers and prison employees may be negligent for failure to provide adequate medical assistance if failure causes inmate to sustain serious illness or injury

Estelle v Gamble
97 S. Ct. 285 (1976)
Meriwether v Faulkner
821 F2d 408, 411
(7th Cir 1987)
Bowring v Godwin
551 F2d 44
(4th Cir 1977)

b. Serious medical need—8th Amendment requires treatment for only serious medical needs

Woods v Thieret
903 F2d 1080, 1082
(7th Cir 1990)

5) Diet—8th Amendment establishes a constitutional right to nutritionally adequate meals

Johnson v Glick
481 F2d 1028
(2d Cir 1973)
Kinney v
Indiana Youth Ctr
950 F2d 462
(7th Cir 1991)
Davis v Lane
814 F2d 397
(7th Cir 1987)

6) Excessive force

Hudson v McMillian
112 S. Ct. 995 (1992)

a. Whether force was applied in good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm

b. No significant injury required

c. Use of force must be more than *de minimis*

Farmer v Brennan
114 S. Ct. 1970 (1994)
Duane v Lane
959 F2d 673
(7th Cir 1992)
McGill v Duckworth
944 F2d 344
(7th Cir 1991)

7) Failure to protect

Walsh v Brewer
733 F2d 473
(7th Cir 1984)
Little v Walker

552 F2d 193, 197–98
(7th Cir 1977)

a. Objective basis on which to know inmate will be attacked

Farmer v Brennan
114 S. Ct. 1970 (1994)
Duane v Lane
959 F2d 673
(7th Cir 1992)
McGill v Duckworth
944 F2d 344
(7th Cir 1991)

b. Deliberate indifference to safety

- Official must both know of and consciously disregard an excessive risk to inmate health or safety

D. Fourteenth Amendment

Shango v Jurich
681 F2d 1091
(7th Cir 1982)
Greening v Moran
953 F2d 301
(7th Cir 1992)
Snowden v Hughes
64 S. Ct. 397 (1944)
Archie v City of Racine
847 F2d 1211
(7th Cir 1987) (en banc)

1) Failure to comply with state law

a. Due-process procedural protections not established by state law; they are prescribed by the US Constitution. Mere violation of state statute does not necessarily infringe federal Constitution

Mathews v Eldridge
96 S. Ct. 893 (1976)
Felce v Fiedler
974 F2d 1484
(7th Cir 1992)

b. If there is a constitutional right, question of what process is due requires balancing test

Kinney v
Indiana Youth Ctr
950 F2d 462
(7th Cir 1991)

2) Excessive force

a. Use of force in prison context is analyzed under 8th Amendment standards, not 14th Amendment

Wilson v Williams
83 F3d 870, 875–77
(7th Cir 1996)

b. Excessive force claims of pretrial detainees brought under 14th Amendment but incorporate 8th Amendment standards

AJ v Kierst
56 F3d 849, 854
(8th Cir 1995)
Milonas v Williams
691 F2d 931, 942 & n10
(10th Cir 1982)

c. Challenges to Juv detainee's conditions of confinement, including excessive force, implicate 14th Amendment due-process rights rather than 8th Amendment rights

Wolff v McDonnell
94 S. Ct. 2963 (1974)
DeMallory v Cullen
855 F2d 442
(7th Cir 1988)
Caldwell v Miller
790 F2d 589, 606
(7th Cir 1986)

3) Access to Cts

Lewis v Casey
116 S. Ct. 2174 (1996)

a. Applies only to a prisoner's right to file an action in Ct not to any right to effectively litigate that action once in Ct

Lewis v Casey
116 S. Ct. 2174 (1996)

b. Applies only to actions in which prisoners attack their sentences, directly or collaterally, or challenge their conditions of confinement

Bounds v Smith
97 S. Ct. 1491 (1977)

c. Prisons must provide prisoners with either an adequate law library or assistance of persons trained in the law

Johnson v Avery
89 S. Ct. 747 (1969)

d. Assistance of other prisoners

Lewis v Casey
116 S. Ct. 2174 (1996)
Bounds v Smith
97 S. Ct. 1491 (1977)
Cf Shaw v Murphy
121 S. Ct. 1475 (2001)

- Prisons must allow adequate opportunity for prisoners to assist other prisoners with legal matters or provide adequate alternatives

Shaw v Murphy
121 S. Ct. 1475 (2001)

- Inmates do not possess a First Amendment right to provide legal assistance to fellow inmates beyond protection normally afforded prisoners' speech

Wetmore v Fields
458 FSupp 1131, 1143
(WD Wis 1978)

- Paralegal training unnecessary

Shaw v Murphy
121 S. Ct. 1475, 1479–80

(2001)

- Prison restrictions on jailhouse lawyers tested under rational basis test

Hossman v Spradlin
812 F2d 1019, 1021
(7th Cir 1987)

e. Law library

Lindquist v
Idaho State Bd of Corr
776 F2d 851, 856
(9th Cir 1985)

- Prison law collection need not contain all research materials of an ideal law library

Campbell v Miller
787 F2d 217, 227
(7th Cir 1986)

- Delay in accessing the law library not per se unconstitutional

DeMallory v Cullen
855 F2d 442, 447
(7th Cir 1988)

- Prisoners in segregation are entitled to a starter law library or adequate alternatives

Bausch v Cox
32 FSupp2d 1057
(ED Wis 1998)

- To state a claim, prisoner must allege that inadequacy "has hindered, or is presently hindering, his efforts to pursue a nonfrivolous claim"

f. Photocopies/Postage

Bounds v. Smith
97 S. Ct. 1491, 1496 (1977)

- Inmate right to Ct access includes State's obligation to provide indigent prisoners "with paper and pen to draft legal documents with notarial services to authenticate them, and with stamps to mail them"

Lewis v Casey
116 S. Ct. 2174, 2182
(1996)

- Limits *Bounds* holding only to tools necessary to nonfrivolously attack convictions and sentences directly or collaterally and to challenge conditions of confinement

Lewis v Sullivan
279 F3d 526, 528
(7th Cir 2002)
Reynolds v Wagner
128 F3d 166, 183
(3d Cir 1997)
Gaines v Lane
790 F2d 1299, 1308
(7th Cir 1986)
Jones v Franzen
697 F2d 801, 803
(7th Cir 1983)

- Inmates possess no constitutional right to subsidized litigation

Lewis v Casey
116 S. Ct. 2174 (1996)

g. Actual injury required in access to Ct claims

Moeck v Zajackowski
(In re Warden of
Wis St Prison)
541 F2d 177, 180
(7th Cir 1976)

h. Qualified right to personal appearance in civil action

Piper v Popp
167 Wis. 2d 633 (1992)

- No constitutional right to appointment of counsel in tort action

4) Prison discipline

Sandin v Conner
115 S. Ct. 2293 (1995)

a. No claim if discipline does not involve the deprivation of liberty such as the extension of mandatory release date

Edwards v Balisok
117 S. Ct. 1584 (1997)

b. No claim if allegations would necessarily imply the invalidity of the discipline or the discipline has not been vacated through state law remedies of certiorari or habeas corpus

Hamlin v Vaudenberg
95 F3d 580
(7th Cir 1996)
Irby v Macht
184 Wis. 2d 831 (1994)

c. No civil rights damage claim if adequate postdeprivation remedy; certiorari or the Inmate Complaint Review System are adequate state remedies

Wolff v McDonnell
94 S. Ct. 2963 (1979)

d. Procedural rights

Culbert v Young
834 F2d 624
(7th Cir 1987)

e. Reason for disciplinary decision

Superintendent v Hill
105 S. Ct. 2768 (1985)

f. Modicum of evidence

Hudson v Palmer
104 S. Ct. 3194 (1984)
Parratt v Taylor
101 S. Ct. 1908 (1981)

5) Deprivation of property

Zinermon v Burch
110 S. Ct. 975 (1990)

Hudson v Palmer
104 S. Ct. 3194 (1984)

No claim under 42 USC § 1983 if there exists an adequate postdeprivation remedy under State law, even if conduct was intentional

Sandin v Conner
115 S. Ct. 2293 (1995)
Wagner v Hanks
128 F3d 1173, 1174
(7th Cir 1997)

6) State law may create a constitutionally protected liberty interest only if it imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life

Santiago v Ware
205 Wis. 2d 295
(Ct. App. 1996)

a. Interest must be of real substance comparable to the loss of good time or extension of mandatory release date

Sandin v Conner
115 S. Ct. 2293 (1995)
Kirsch v Endicott
201 Wis. 2d 705
(Ct. App. 1996)

b. Segregated confinement generally does not create a liberty interest

Wilkinson v Austin
125 S. Ct. 2384 (2005)
Townsend v Fuchs
522 F3d 765, 772
(7th Cir 2008)
see also Gillis v Litscher
468 F3d 488
(7th Cir 2006)

c. Conditions in Ohio high-security (Supermax) prison, however, implicated a liberty interest but only because there was loss of parole and placement was indefinite

Marion v Columbia
Correctional Inst
559 F3d 693, 697
(7th Cir 2009)

d. Duration of segregation, together with conditions of segregation, may trigger a liberty interest

Higgason v Farley
83 F3d 807, 809–10
(7th Cir 1996)
Martinkoski v Wis Dept
of Corrections
896 FSupp 882
(ED Wis 1995)

e. There is no liberty interest in social, rehabilitative, or educational programs

Santiago v Ware
205 Wis. 2d 295
(Ct. App. 1996)
St ex rel Harris v Smith
220 Wis. 2d 158
(Ct. App. 1998)
Compare Young v Harper
117 S. Ct. 1148 (1997)

f. Community Residential Confinement (CRC) does not create a liberty interest

g. DIS (Intensive Sanctions) status does not create a liberty interest

Townsend v Fuchs
522 F3d 765, 771–72
(7th Cir 2008)
Russ v Young
895 F2d 1149
(7th Cir 1989)
Casteel v McCaughtry
176 Wis. 2d 571 (1993)
Wis Adm Code
§ DOC 303.10

h. Temporary lockup regulations do not create liberty interest

Meachum v Fano
96 S. Ct. 2532 (1976)
Whitford v Boglino
63 F3d 527
(7th Cir 1995)
Evers v Sullivan
2000 WI App 144
237 Wis. 2d 759

i. Transfer to more restrictive prison does not implicate liberty interests

Olim v Wakinekona
103 S. Ct. 1741 (1983)
Lambert v Sullivan
35 FSupp2d 1131
(ED Wis 1999)
Evers v Sullivan
2000 WI App 144
237 Wis. 2d 759

j. Transfer to an out-of-state prison does not implicate liberty interests

Culbert v Young
834 F2d 624
(7th Cir 1987)
Wis Adm Code
§§ DOC 303.69–.72

k. Classification of offense does not create liberty interest

White v Napoleon
897 F2d 103, 113
(3d Cir 1990)

7) Right to decline medical treatment—prisoners retain only a limited right to decline medical treatment, a right that must give way to "legitimate countervailing State interests"

E. Hunger Strike/Forced Feeding

DOC v Lilly (In re Lilly)
2011 WI App 123
337 Wis. 2d 185
DOC v Saenz
(In re Saenz)
2007 WI App 25
299 Wis. 2d 486

1) Forced-feeding or hydration procedures, authorized by Ct for administration by DOC, implicate inmates' liberty interests and must satisfy due-process requirements

DOC v Saenz
(In re Saenz)
2007 WI App 25
299 Wis. 2d 486

2) DOC, with a proper showing, may obtain temporary ex parte Ct orders authorizing the forced feeding or hydration of hunger-strike prisoners

DOC v Saenz
(In re Saenz)
2007 WI App 25
299 Wis. 2d 486

3) However, due process requires that the duration of such orders be limited to the time reasonably necessary to allow Ct to conduct a hearing with the prisoner's participation

DOC v Saenz
(In re Saenz)
2007 WI App 25
299 Wis. 2d 486

4) Due process requires that any order for forced feeding or hydration not be indefinite or permanent in duration, but must include a mechanism for periodic review

DOC v Lilly
(In re Lilly)
2011 WI App 123, ¶ 27
337 Wis. 2d 185

Standards for the periodic reviews discussed in *Lilly*

F. Americans with Disabilities Act (ADA) and Rehabilitation Act

Pennsylvania Dept of
Corrections v Yeskey
118 S. Ct. 1952 (1998)
Crawford v Indiana
Dept of Corrections
115 F3d 481
(7th Cir 1997)

1) Title II of the ADA, 42 USC §§ 12131–12165, applies to prisons

2) 42 USC § 12132 provides as follows: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"

Sallenger v
City of Springfield
No. 03-3093
2005 WL 2001502
(CD Ill 8/4/2005)
(unpublished op), *aff'd on*
other grounds sub nom
Sallenger v Oakes
473 F3d 731
(7th Cir 2007)

3) There is no personal damage liability for individual Defs for damages under Title II, although they may be sued in their official capacities for prospective injunctive relief

Bd of Trustees v Garrett
121 S. Ct. 955 (2000)

4) Although States are governed by Title I of the ADA, 42 USC §§ 12111–12117, Congress did not validly abrogate States' immunity from suit under those provisions

Tennessee v Lane
124 S. Ct. 1978, 1994
(2004)

5) But State immunity was validly abrogated as to cases under Title II of the ADA, "implicating the fundamental right of access to the Cts"

US v Georgia
126 S. Ct. 877, 882 (2006)

6) Further, ADA Title II validly abrogates State sovereign immunity insofar as it creates a private cause of action for damages against States for conduct that actually violates 14th Amendment

Stanley v Litscher
213 F3d 340, 344
(7th Cir 2000)

7) State immunity also does not bar suits against entities receiving federal funding under the Rehabilitation Act, 29 USC § 794, which is substantively the same as the ADA but was enacted under the Spending Clause

12. John Doe

968.26

A. For a general discussion of John Doe procedures, see CR 48 in the Criminal Benchbook

B. A John Doe petition is not a "civil action or special proceeding," so the requirements of the PLRA do not apply

Naseer v Miller (In re John Doe Petition)
2010 WI App 142
329 Wis. 2d 724

C. Standard for referring a prisoner's John Doe petition to the DA is discussed in *Naseer*

13. Public Health/Clemency Requests

St v Gibbons
71 Wis. 2d 94, 99 (1976)
St v Lynch
105 Wis. 2d 164, 168
(Ct. App. 1981)

A. The DOC is responsible for running state correctional facilities. The Ct is not

St v Gibbons
71 Wis. 2d 94, 99 (1976)
St v Lynch
105 Wis. 2d 164, 171
(Ct. App. 1981)

B. Prisoners may challenge the conditions of their confinement by appropriate writs, such as habeas corpus

St v Krieger
163 Wis. 2d 241, 258–60
(Ct. App. 1991)

C. Motions for sentence modification are not the appropriate vehicle to challenge conditions of confinement

St v Klubertanz
2006 WI App 71, ¶ 40
291 Wis. 2d 751

D. A Ct's inherent authority to review its sentence to determine whether it is "unduly harsh" does not include the authority to reduce a sentence based on events that occurred after sentencing

St v Klubertanz
2006 WI App 71, ¶ 41
291 Wis. 2d 751

E. Events occurring after sentencing would be governed by "new factor" analysis. One possible consideration: does the later event frustrate the purpose of the sentence?

14. Deductions from Inmate Accounts

§ 973.20(11)(c)

A. DOC must deduct an amount it determines to be reasonable from an inmate's wages and from other moneys held in the inmate's account for all Ct-ordered restitution

St ex rel Ortiz v Carr
2022 WI App 16
401 Wis. 2d 450

1) DOC generally uses 50% as a reasonable percentage for these deductions, but must follow a Ct order if the Ct orders a different rate

St ex rel Markovic v Litscher
2018 WI App 44
383 Wis. 2d 576

2) DOC may continue to withhold restitution even after the sentence containing that restitution order has been served

St v Greene
2008 WI App 100
313 Wis. 2d 211

B. Gifts are part of other moneys held in the inmate's account

§ 973.20(12)

C. Ct-ordered costs and surcharges are generally combined with restitution in this withholding process

St ex rel Bryson v Carr
2022 WI App 34
404 Wis. 2d 307

1) Sentencing Ct has primary authority over the rate at which an inmate's moneys are deducted for Ct fees

St ex rel Bryson v Carr
2022 WI App 34
404 Wis. 2d 307

2) DOC has primary authority over the rate at which an inmate's moneys are deducted for most surcharges

CV 46: DECLARATORY JUDGMENTS

1. Scope of Declaratory Judgments

§ 806.04(1)

A. Ct has power to declare rights, status, and other legal relations whether or not relief is or could be claimed

Declaration may be either affirmative or negative in form and effect

§ 806.04(6)

B. Rendering declaratory judgment is discretionary

Ct may refuse to render or enter declaratory judgment where even if rendered it would not terminate the uncertainty or controversy giving rise to the proceeding

§ 806.04(1)

C. Declarations shall have force and effect of final judgment or decree

§ 806.04(12)

D. Sec.

806.04 is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered

Loy v Bunderson
107 Wis. 2d 400 (1982)

2. Four Requisites for Declaratory Judgment

Fabick v Evers
2021 WI 28, ¶ 9
396 Wis. 2d 231
WEAC v St Elections Bd
2000 WI App 89
234 Wis. 2d 349

A. Justiciable controversy must exist

B. Controversy must be between persons whose interests are adverse

C. Plaintiff must have legally protectable interest in the controversy

Lake Country Racquet &
Athletic Club v
Vill of Hartland
2002 WI App 301 ¶ 15
259 Wis. 2d 107

Plaintiff must have personal stake in outcome and be directly affected by issue in controversy

D. Issue must be ripe for determination

Papa v DHS
2020 WI 66, ¶¶ 29–31

393 Wis. 2d 1
Putnam v
Time Warner Cable
2002 WI 108
255 Wis. 2d 447

1) However, ripeness required for a declaratory judgment is different from ripeness required in other actions. Harm may be anticipatory, if imminence and practical certainty of act or event exist

Village of Newburg
v Town of Trenton
2009 WI App 139, ¶¶ 7–9, 321 Wis. 2d 424

2) Violations of a law that later sunsets do not make a controversy moot. Declaratory judgment still available

3. Bringing a Declaratory Judgment

A. Venue. *See* CV 30, Sec. 1, for venue in declaratory-judgment actions challenging validity of administrative rules

B. Declaratory-judgment action may be brought in the following circumstances

§ 706.057(.9)(a)

1) To determine the ownership of an interest in minerals when interest is the subject of a claim

§ 19.59(8)(b)

2) To determine coverage of public officials' codes of ethics

§ 19.97(2)

3) To determine duties of a public official under Wis Open Meetings Law

Fabyan v Achtenhagen 2002 WI App 214
257 Wis. 2d 310

Failure to title private prosecutor action "State ex rel." was fatal because it deprived Ct of competency to proceed

§ 59.69

4) When there is a claim that a zoning ordinance is unconstitutional

Kmiec v
Town of Spider Lake
60 Wis. 2d 640 (1973)

a. Do not have to exhaust administrative remedies first

Master Disposal, Inc v
Vill of Menomonee Falls
60 Wis. 2d 653 (1973)

b. But certiorari is exclusive remedy to challenge procedure in application of ordinance

§ 74.35

5) In tax disputes

§ 767.80

6) To determine paternity or to rebut presumption of paternity under § 891.405 (acknowledgment of paternity), § 891.407 (paternity based on genetic test results), or § 891.41 (presumption of paternity based on marriage)

§ 227.40

7) To challenge validity of administrative rule

Venue. *See* **CV 30, Sec. 1**

§ 806.04(4)

8) By any person interested in the administration of a trust or of the estate of a decedent, an infant, individual adjudicated incompetent, or insolvent

a. To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

b. To direct the personal representatives or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

c. To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings

§ 806.04(2)

9) By any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise

a. To obtain a declaration of rights, status, or other legal relations thereunder

- No party shall be denied the right to have declared the validity of any statute or municipal ordinance by virtue of the fact that the party holds a license or permit under such statutes or ordinances

§ 806.04(3)

10) To construe a contract either before or after there has been a breach

§ 806.04(5)

11) Enumeration does not limit or restrict exercise of general powers in any proceeding in which declaratory relief is sought and in which a judgment or decree will terminate the controversy or remove an uncertainty

Zizzo v Lakeside Steel & Mfg Co
2008 WI App 69, ¶ 15,
312 Wis. 2d 463

12) Plaintiff may assert laches

C. Declaratory-judgment action may NOT be brought

§ 62.23
Master Disposal v Menomonee Falls
60 Wis. 2d 653 (1973)

1) To challenge refusal by Bd of Appeals to hear an appeal when grounds are a constitutional lack of due process in the proceedings

Dawson v
Town of Jackson
2011 WI 77, ¶ 73
336 Wis. 2d 318

2) When certiorari is statutorily prescribed, unless inadequate to resolve issue presented or to effect remedy sought

a. Contest of highway orders is by certiorari, not declaratory judgment

Voters with Facts v
City of Eau Claire
2018 WI 63
382 Wis. 2d 1

b. Creation or expansion of tax incremental district (TID) is by certiorari and not by declaratory judgment

4. Procedure

§ 806.04(6)

A. Ct may refuse to render or enter declaratory judgment or decree

Proper when the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding

B. Jury trial permissible

§ 806.04(9)

1) When a proceeding involves determination of an issue of fact, the issue may be tried and determined in same manner as issues of fact are tried and determined in other civil actions

2) Conducted in Ct in which proceeding is pending

C. Parties and persons entitled to be heard

§ 806.04(11)

1) All persons to be made parties who have or claim any interest that would be affected by the declaration

No declaration may prejudice the rights of non-parties

2) In proceeding involving validity of municipal ordinance or franchise, municipality must be made a party and is entitled to be heard

3) If statute, ordinance, or franchise alleged to be unconstitutional, AG must also be served with copy of proceeding and be entitled to be heard

4) If rulemaking in issue, certain legislative committees may be entitled to be heard

5. Standard of Review

Olson v
Town of Cottage Grove
2008 WI 51, ¶ 35,
309 Wis. 2d 365

A. Decision to grant or deny declaratory relief falls within discretion of Circuit Ct and will not be overturned unless erroneous exercise of discretion

SECURA Ins v Lyme St
Croix Forest Co
2018 WI 103, ¶ 14
384 Wis. 2d 282

But if the ruling for declaratory judgment depends on questions of law, it is reviewed under the de novo standard

Olson v
Town of Cottage Grove
2008 WI 51, ¶ 32,
309 Wis. 2d 365

B. But Circuit Ct's decision to grant summary judgment for lack of ripeness is reviewed under de novo standard

CV 47: SECTION 102.29 (THIRD-PARTY) ACTIONS

1. Nature of the Third-Party Claims

§ 102.03(2)

A. General Rule

1) Worker's compensation is employee's exclusive remedy against employer, fellow employee, or compensation insurer for any job-related injury

Martine v Williams
2011 WI App 68
333 Wis. 2d 203

Worker's compensation settlement with employer precludes suit against co-employee even when suit claims that "horseplay" incident that caused plaintiff's injury did not arise out of employment

Miller v Bristol-Myers Co
168 Wis. 2d 863, 879
(1992)

2) Representative capacity doctrine extends exclusive remedy rule to those who act in representative capacity for employer

Miller v Bristol-Myers Co
168 Wis. 2d 863, 881
(1992)

a. Does not apply to parent corporation of subsidiary employer

Walstrom v Gallagher
Bassett Servs, Inc
2000 WI App 247
239 Wis. 2d 473

b. Applies to adjuster hired to administer claims on behalf of worker's compensation insurer

B. Exception—§ 102.29

1) Sec. 102.29 allows employee with compensable injury to maintain separate action in tort against any responsible third party

2) Employer and compensation insurer have right of reimbursement for benefits paid or obligated to be paid under Ch 102 and may maintain the action under § 102.29

C. Potential third-party Defs include

1) Tortfeasor causing original injury

2) Health-care provider negligent in treatment of compensable injury

Holdmann v Smith Labs
151 Wis. 2d 813
(Ct. App. 1989)

3) Manufacturer of product used in treatment of compensable injury

4) Employer can be third party under § 102.29 if

Schweiner v
Hartford Acc & Indem Co
120 Wis. 2d 344, 352
(Ct. App. 1984)

a. Its involvement is shown to be distinct from its status as employer. (Dual persona doctrine) or

Larsen v JI Case Co
37 Wis. 2d 516 (1968)

b. Employer expressly waives the exclusive remedy provision under § 102.03(2) or

Maas v Ziegler
172 Wis. 2d 70, 82 (1992)

- Insurer waives, through terms of acquired insurance policy, by express policy language indicating waiver was intended

Lentz v Young
195 Wis. 2d 457
(Ct. App. 1995)

c. Intentional acts of sexual harassment by employer are shown

5) Following are specifically excepted as a third party under § 102.29

§ 102.29(6)
Kopfhamer v MG&E
2002 WI App 266
258 Wis. 2d 359

a. Users of temporary help services

See 2007 Wis Act 185

- Sec. 102.29(6)(a) defines *temporary help agency* as one "primarily engaged in the business of placing its employees with or leasing its employees to another employer as provided in § 102.01(2)(f)"

§ 102.29(7)
Seaman Body Corp v Indus Comm'n
204 Wis. 157 (1931)

b. Employers accepting services of loaned employees

§ 102.29(6m)

c. Leased employees as defined in § 102.315(1)(g)

Smith v Long
178 Wis. 2d 797
(Ct. App. 1993)
Johnson v ABC Ins
193 Wis. 2d 35 (1995)

D. Elements of § 102.29 claim

1) Must be an action in tort

2) Must be an injury [as defined in § 102.01(2)(c)] to employee or death to employee

3) Employer or its insurer is or may be liable for injury under Ch 102

§ 102.29(1)
Threshermens Mut Ins Co v Page
217 Wis. 2d 451 (1998)
Martinez v Ashland Oil
132 Wis. 2d 11, 15–16
(Ct. App. 1986)

E. Employer and compensation insurer granted limited right of reimbursement from proceeds of employee's third-party action

1) Common-law subrogation principles such as the "made whole" doctrine are inapplicable to § 102.29 reimbursement claims

Campion v Montgomery Elevator Co
172 Wis. 2d 405
(Ct. App. 1992)

2) Employer's waiver of subrogation rights in written agreement with third party does not affect its right to reimbursement under § 102.29

3) Compensation insurer (or employer) may present employee's claim for pain and suffering and future medical expenses without employee's active participation in the case

§ 102.29(1)

F. Making a claim against an employer or compensation insurer under Ch 102 does not affect right of employee, employee's representative, etc., to bring third-party action

1) Employer or compensation insurer who has paid or is obligated to pay on employee's behalf has same right

2) If the Dept pays or is obligated to pay under § 102.66(1) or § 102.81(1), the Dept shall also have the right to maintain an action in tort against any other party for the employee's injury or death

§ 102.29(1)

G. In making a third-party claim, each party to give to the other reasonable notice and opportunity to join in making of such claim

If a party entitled to notice cannot be found, DWD becomes agent

§ 102.29(1)

H. Each party to have voice in prosecution of the claim with any disputes settled by Ct

2. Section 102.29 Formula

Kottka v PPG Indus
130 Wis. 2d 499, 510
(1986)

A. Absent an agreement to the contrary, proceeds of a third-party action in a worker's compensation case must be allocated according to § 102.29(1)

Anderson v MSI
Preferred Ins Co
2005 WI 62
281 Wis. 2d 66
Vande Corput v
Pekin Ins Co
2018 WI App 56
384 Wis. 2d 252

B. Deduct reasonable collection costs

1) If employee and insurer both represented, insurer's Atty fees are part of reasonable collection costs. Insurer not required to pay Atty fees out of reimbursed award

Sinkler v Am Fam
Mut Ins Co
2019 WI App 64
389 Wis. 2d 273

Ct may, in its discretion, find that an insurer's contingent-fee agreement with its Atty is unreasonable and, thus, reject it as a basis for determining value of insurer's cost of collection

2) After determining the reasonable amount of the Atty fees and costs for both parties in the aggregate, Ct must direct how those fees are to be divided between the employee's and insurer's Attys

SCR 20:1.5(a)
Anderson v MSI
Preferred Ins Co

2005 WI 62, ¶ 36
281 Wis. 2d 66

3) "Costs of collection" may include contingency fees, but a contingency-fee agreement is only a guide when calculating reasonable Atty fees and is not controlling

C. 1/3 of remainder to employee or "employee's personal representative or other person entitled to bring action"

Skirowski v
Employers Mut Cas Co
158 Wis. 2d 242, 249
(Ct. App. 1990)

In structured settlement, "remainder" from which employee to receive first 1/3 is remainder of the front payment, not remainder of gross settlement payable over time

D. Reimburse worker's compensation payer for payments made or obligated to be made

La Chance v
Thermogas Co
120 Wis. 2d 569
(Ct. App. 1984)

1) Employer's negligence does not affect its right to reimbursement

Houlihan v ABC Ins
198 Wis. 2d 133 (1995)

2) Compensation insurer entitled to reimbursement out of settlement proceeds paid by employer in consideration of employee's assumption of employer's indemnification obligation to third-party tortfeasor

Simanek v
Miehle-Goss-Dexter
113 Wis. 2d 1, 6
(Ct. App. 1983)

3) In structured settlement, statute does contemplate deferring reimbursement until after employees receive their 1/3

§ 102.29(1)

4) Penalty items payable by employer or carrier are not reimbursable. These include

§ 102.18(1)(bp)

a. Bad faith

§ 102.22

b. Delayed payments

§ 102.35(3)

c. Failure to rehire injured employee

§ 102.57

d. Safe-place violation

§ 102.60

e. Illegally employed minor

E. Pay balance to employee or "employee's personal representative or other person entitled to bring action"

This balance is commonly referred to as "the cushion" because it is applied toward any future worker's compensation benefits that may accrue

3. Damages Subject to Division Under § 102.29

Kottka v PPG Indus
130 Wis. 2d 499, 515
(1986)

A. Damages for pain and suffering

Nelson v Rothering
174 Wis. 2d 296 (1993)

B. Damages for aggravation of preexisting injury

Johnson v ABC Ins
193 Wis. 2d 35 (1995)

C. Pecuniary damages for wrongful death

§ 102.29(3)
Sutton v Kaarakka
159 Wis. 2d 83
(Ct. App. 1990)

D. Damages for medical malpractice in treatment of compensable injury

Holdmann v Smith Labs
151 Wis. 2d 813, 816–17
(Ct. App. 1989)

E. Damages recovered from third-party manufacturer of product used in treatment of compensable injury

4. Damages Not Subject to Division Under § 102.29

Kottka v PPG Indus
130 Wis. 2d 499, 521
(1986)

A. Loss of society and companionship and financial support

1) Derivative claim

2) Not claim for "the injury or death of an employee" as required by § 102.29(1)

Smith v Long
178 Wis. 2d 797, 805–06
(Ct. App. 1993)

B. Legal malpractice in prosecuting third-party action under § 102.29

1) Separate and independent loss from employee hiring an Atty

Berna-Mork v Jones
174 Wis. 2d 645 (1993)

C. Uninsured motorist coverage proceeds

Based on contract, not action in tort

5. Competing Claims

A. When proceeds are insufficient to cover competing claims, one falling under § 102.29(1) and the other not, division made as follows

Brewer v
Auto-Owners Ins Co
142 Wis. 2d 864, 865–66
(Ct. App. 1987)

1) Determine value of each claim

2) Prorate proceeds between all claims

3) Exclude amounts allocated to those claims not subject to § 102.29

4) Follow § 102.29 allocation for remaining claims

6. Reimbursement of Payments to State Treasury

§ 102.29(2)

A. Employer or insurer liable to make payment into State treasury has right to maintain action against a negligent third party

Gerth v Amer Star Ins Co
166 Wis. 2d 1000, 1013
(Ct. App. 1992)

Worker's compensation carrier joined as party Def can preserve right to recovery against third-party tortfeasor

Not necessary to file cross-claim or commence separate action against third-party tortfeasor

7. Settlements

§ 102.29(1)

A. Settlement of any third-party claim shall be void unless settlement and distribution approved by Ct

Skirowski v
Employers Mut Cas Co
158 Wis. 2d 242, 250
(Ct. App. 1990)

In order for approval of settlement providing distribution that differs from statute, all parties, including insurer, must unanimously agree to alternative settlement

Herlache v Blackhawk
Collision Repair
215 Wis. 2d 99
(Ct. App. 1997)

B. Failure by worker's compensation insurer to appear at hearing to approve distribution of settlement proceeds constitutes waiver of its right to object to amount or terms of settlement

Bergren v Staples
263 Wis. 477 (1953)
Dalka v Am Fam
Mut Ins Co
2011 WI App 90
334 Wis. 2d 686

C. Upon worker's comp insurer's motion, Ct may approve settlement of third-party claim over employee's objection

8. Common Insurer Conflicts

§ 102.29(4) When employer and third-party tortfeasor are insured by same insurer, the employer's insurer shall promptly notify the parties in interest and DWD

§ 102.29(5) An insurer who fails to comply with this notice provision and fails to commence a third-party action within period specified in § 893.54, may not plead § 893.54 as a defense against any such third party after 3 years from the date of injury, but before 6 years from the date of injury

CV 48: INSURANCE QUESTIONS

1. Construction of Insurance Policies

A. Standards

1) Basic principles of policy interpretation

Kozlik v Gulf Ins Co
2003 WI App 251, ¶ 8
268 Wis. 2d 491
Est of Ermenc v
Am Fam Mut Ins
221 Wis. 2d 478
(Ct. App. 1998)

a. Insured has initial burden to show coverage. Insurer has the burden of proving exceptions to coverage

Folkman v Quamme
2003 WI 116, ¶ 12
264 Wis. 2d 617

b. Insurance contract interpretation presents a question of law for Ct to decide

Folkman v Quamme
2003 WI 116, ¶ 12
264 Wis. 2d 617

c. Same rules of construction that govern general contracts apply to insurance policies

Folkman v Quamme
2003 WI 116, ¶¶ 12, 16
264 Wis. 2d 617

d. Policy is construed to give effect to parties' intent, as expressed in policy language

Folkman v Quamme
2003 WI 116, ¶ 13
264 Wis. 2d 617

e. If there is no ambiguity in policy language, it is enforced as written without resort to rules of construction or applicable principles of case law

Folkman v Quamme
2003 WI 116, ¶ 13
264 Wis. 2d 617

2) First question—is policy language objectively ambiguous?

Folkman v Quamme
2003 WI 116, ¶ 13
264 Wis. 2d 617

a. Policy language is ambiguous if it is susceptible to more than one reasonable interpretation

Folkman v Quamme
2003 WI 116, ¶¶ 13, 16
264 Wis. 2d 617

b. Ambiguous policy language will be construed in favor of insured

Bethke v Auto-Owners Ins Co
2013 WI 16, ¶ 20
345 Wis. 2d 533
Folkman v Quamme
2003 WI 116, ¶ 17
264 Wis. 2d 617

c. Policy language is given its common, ordinary meaning—i.e., what reasonable person in position of insured would have understood words to mean

Folkman v Quamme
2003 WI 116, ¶ 20
264 Wis. 2d 617

d. Policy language will be interpreted against insured when interpretation conforms to what reasonable person would have understood words to mean

3) Second question—is policy language contextually ambiguous?

Folkman v Quamme
2003 WI 116
¶¶ 18, 19, 24
264 Wis. 2d 617

a. Although some ambiguity is unavoidable because words are unable to anticipate every eventuality, occasionally a clear and unambiguous provision can be found ambiguous in context of entire policy

Folkman v Quamme
2003 WI 116, ¶ 21
264 Wis. 2d 617

b. Policy language should not be made ambiguous by isolating a small part from the whole policy

Folkman v Quamme
2003 WI 116, ¶ 29
264 Wis. 2d 617

c. Contextual ambiguity in a policy must be genuine and apparent on the face of the policy

Folkman v Quamme
2003 WI 116, ¶ 29
264 Wis. 2d 617

d. Test for determining whether contextual ambiguity exists is same as test for ambiguity in any disputed policy terms: Are words or phrases of insurance contract, when read in context with policy's other language, reasonably or fairly susceptible to more than one construction?

Folkman v Quamme
2003 WI 116
¶¶ 37, 39, 56
264 Wis. 2d 617

e. Organization and structure of policy have bearing on contextual ambiguity

4) Ambiguities must be material

Folkman v Quamme
2003 WI 116, ¶ 32
264 Wis. 2d 617

a. Inconsistent or ambiguous terms must be material to issue in dispute and of such a nature that a reasonable person would find alternative meaning

Folkman v Quamme
2003 WI 116, ¶ 31
264 Wis. 2d 617

b. Remotely possible interpretations do not create an ambiguity

5) Ambiguity question is case-specific

Klinger v Prudential
Prop & Cas Ins Co
2005 WI App 105, ¶ 13
282 Wis. 2d 535
Kendziora v
Church Mut Ins Co
2003 WI App 83, ¶ 23
263 Wis. 2d 274

a. Whether policy terms are ambiguous depends on individual facts of each case not hypothetical scenarios

Bethke v Auto-Owners
Ins Co
2013 WI 16, ¶¶ 20–21
345 Wis. 2d 533

b. If a "reasonable insured" would not understand a policy term as applied, it may be ambiguous

6) Compliance with statutes

§ 631.15(3m)
Brunson v Ward
2001 WI 89
245 Wis. 2d 163

Policy provisions inconsistent with insurance statutes are enforceable against insurers as if they conformed to statute

B. Exclusions

Am Fam Mut Ins Co v American Girl, Inc 2004 WI 2, ¶ 24 268 Wis. 2d 16

1) Methodology of analyzing exclusions

Day v Allstate Indem Co 2011 WI 24, ¶ 26 332 Wis. 2d 571

a. Examine facts of claim to determine whether insuring agreement initially grants coverage

5 Walworth, LLC v Engerman Contracting, Inc, 2023 WI 51, ¶¶ 3, 31 408 Wis. 2d 39, *overruling Wisconsin Pharmacal Co v Nebraska Cultures of Cal, Inc*, 2016 WI 14 367 Wis. 2d 221

- When analyzing whether commercial general liability (CGL) policy grants coverage, this step requires determining whether an "occurrence" caused "property damage," as those terms are defined in the policy

McLaughlin v Gaslight Pointe Condo Ass'n 2024 WI App 30, ¶¶ 27–31 412 Wis. 2d 140

- An intentional act by an insured can lead to a covered occurrence—an accident—that causes property damage. A reasonable jury could conclude that the insured did not make intentional efforts to cause damages, but that the damages were an unexpected effect of the insured's intentional decision

b. Determine whether any exclusions exist to preclude coverage for claim. Analyze each exclusion separately

c. Determine whether applicable exclusion has exception that reinstates coverage

Am Fam Mut Ins Co v American Girl, Inc 2004 WI 2, ¶ 24 268 Wis. 2d 16

2) Exclusions are narrowly or strictly construed against insurer if their effect is uncertain

Bethke v Auto-Owners Ins Co 2013 WI 16 345 Wis. 2d 533

3) If application of an exclusion leads to an "absurd result," exclusion may be voided

Varda v Acuity 2005 WI App 167, ¶ 24

284 Wis. 2d 552

4) Independent concurrent cause: If policy covers loss caused by one risk, but excludes if caused by another risk, coverage is extended to loss caused by insured risk even though excluded risk contributed to the loss

C. Concurrent liability coverage

Schoenecker v Haines
88 Wis. 2d 665 (1979)

1) Responsible company determined by reviewing each policy's "other insurance" clause

a. "Other insurance" clauses designed to prevent double recovery when there is concurrent insurance coverage

§ 631.43(1)
Schult v
Rural Mut Ins Co
195 Wis. 2d 231
(Ct. App. 1995)
Weimer v
Country Mut Ins
216 Wis. 2d 705 (1998)

- Can stack if separate premium paid for policies to insure against the "same loss"

Martin v Am Fam
Mut Ins Co
2001 WI App 178
247 Wis. 2d 386
aff'd, 2002 WI 40
252 Wis. 2d 103

- Before § 631.43(1) permits stacking, must show risk of loss is the same for which each policy under consideration promises indemnification

b. Cannot interpret competing clauses to allow a forfeiture of coverage

Riccobono v
Seven Star, Inc
2000 WI App 74
234 Wis. 2d 374

c. Attempt should be made to give effect to intent of both policies if language does not conflict

d. When conflicts cannot be reconciled, coverage is prorated based on limits in each policy

2) Generally, 4 types of "other insurance" clauses

a. Pro rata clause

- Limits insurer's liability to its pro rata share of the loss as determined by comparison of respective policy limits of applicable policies

b. Excess clause

- Provides that policy provides excess insurance coverage over any other available insurance policies

c. Escape clause

- Provides indemnity only in event that other insurance totally unavailable to insured

d. Garage customer clause

- Customer is not an insured if other coverage available to customer sufficient to pay damages up to applicable financial responsibility limit

Hillegass v Landwehr
176 Wis. 2d 76 (1993)

3) Self-insurance is "other insurance"

§ 631.43(1)

4) Conflicting "other insurance" clauses

Lubow v Morrissey
13 Wis. 2d 114 (1961)

a. Pro rata and excess clause

- Insurer with pro rata clause is primarily liable to insured

Reetz v Werch
8 Wis. 2d 388 (1959)

b. Excess and excess clause

- Neither clause given effect and

- Liability prorated between the two insurers based on respective policy limits

Plastics Eng'g Co v
Liberty Mut Ins Co
2009 WI 13, ¶ 45
315 Wis. 2d 556

5) Sec. 631.43(1) limitation on "other insurance" provision, when two or more policies promise to indemnify an insured against the same loss, does not apply to successive insurance policies

D. Omnibus coverage

§ 632.32
Clark v
Am Fam Mut Ins Co
218 Wis. 2d 169 (1998)

1) All auto policies issued in Wis must contain provisions required by omnibus statute

Rocker v
USAA Cas Ins Co
2006 WI 26, ¶ 37
289 Wis. 2d 294
Rebernick v
Wausau Gen Ins Co
2006 WI 27, ¶ 14
289 Wis. 2d 324

2) Because one subsection has been held to apply to a certain type of policy does not mean all other subsections apply as well

§ 632.32(3)
Folkman v Quamme
2003 WI 116
264 Wis. 2d 617

3) Coverage to named insured applies in same manner to any person using vehicle described in policy for purposes described in policy. Prohibits insurance companies from insuring only certain drivers

Brunson v Ward
2001 WI 89
245 Wis. 2d 163
Reuter v Murphy
2000 WI App 276
240 Wis. 2d 110

4) Statute mandates coverage even where express terms of policy state the opposite

Heritage Mut Ins Co
v Wilber
2001 WI App 247
248 Wis. 2d 111

5) Statute applies when optional auto coverage is provided under general liability policy

Mau v N Dakota
Ins Reserve Fund
2001 WI 134
248 Wis. 2d 1031

6) Statute applies to indemnity insurance as well as liability policy

Hoff v Wedin
170 Wis. 2d 443
(Ct. App. 1992)

E. Policy limits

Limits must be pleaded and proved at trial. Ct may allow proof on motions after verdict if limits have been pleaded

2. Duty to Defend

Comment
Est of Sustache
v Am Fam Mut Ins Co
2008 WI 87, ¶¶ 20–23
311 Wis. 2d 548
Liebovich v Minn Ins Co
2007 WI App 28, ¶¶ 3–5,
299 Wis. 2d 331, *aff'd*
and modified,

2008 WI 75, ¶ 16,
310 Wis. 2d 751

Note: For a summary of duty to defend and duty to indemnify, see *Estate of Sustache* and *Liebovich*.

Towne Realty
v Zurich Ins
201 Wis. 2d 260 (1996)

A. Tender of defense sufficient if insurer has notice of claim—specific request for defense not required

Three T's Trucking v Kost
2007 WI App 158,
¶¶ 10–14, 303 Wis. 2d 681

Existence of actual lawsuit not condition precedent for valid tender of defense

Fireman's Fund Ins Co
of Wis v Bradley Corp
2003 WI 33
261 Wis. 2d 4

B. Duty determined by comparing allegations of complaint to terms of insurance policy

Grieb v Citizens Cas Co
33 Wis. 2d 552 (1967)

1) Duty exists when complaint alleges at least one claim covered by liability policy

Marks v Houston Cas Co
2016 WI 53, ¶¶ 44, 47
369 Wis. 2d 547

a. Determining the duty to defend is a three-step process

- Examine whether the policy provides an initial grant of coverage for the claims
- Determine whether any exclusions preclude coverage
- Determine whether any exceptions to the exclusions apply

Kraemer Bros Inc
v US Fire Ins Co
89 Wis. 2d 555 (1979)
Grigg v Aarowcast, Inc
2018 WI App 17, ¶ 29
380 Wis. 2d 464
Grube v Daun
173 Wis. 2d 30
(Ct. App. 1992)

b. When some allegations within coverage and others outside coverage, responsibility to defend not apportioned among claims. If insurance policy provides coverage related to even one claim made in the lawsuit, the insurer must defend the entire action; coverage need only be arguable or fairly debatable to trigger duty to defend

2) Duty to defend is question of law initially determined solely by referring to the "four corners" of the complaint

Water Well Solutions
Serv Grp, Inc v
Consolidated Ins Co

2016 WI 54, ¶ 24,
369 Wis. 2d 607

a. There is no exception to the four-corners rule in duty-to-defend cases in Wis

Smith v Katz
226 Wis. 2d 798, 815–16
(1999)

b. Ct is to liberally construe complaint allegations and assume all reasonable inferences

Smith v Katz
226 Wis. 2d 798, 806
(1999)
Jones v Baecker
2017 WI App 3, ¶ 58
373 Wis. 2d 235

c. Duty focuses on nature of claim and has nothing to do with merits: insurer may be obligated to defend an insured against a lawsuit that is groundless, false, or fraudulent if the allegations in the four corners of the complaint assert a claim that would be meritorious if true

Elliott v Donahue
169 Wis. 2d 310 (1992)

d. Duty may not be established or avoided by extrinsic evidence

Gen Cas Co v Hills
209 Wis. 2d 167 (1997)

e. Any doubt regarding duty to defend is resolved in favor of insured

Kenefick v Hitchcock
187 Wis. 2d 218
(Ct. App. 1994)

3) Duty continues only until issue of coverage is resolved

Mowry v
Badger St Mut Cas Co
129 Wis. 2d 496 (1986)

a. Because duty initially determined by the complaint, insurer may be required to pay Atty to represent its insured while it contests coverage

Est of Sustache
v Am Fam Mut Ins Co
2008 WI 87, ¶ 29,
311 Wis. 2d 548

b. When insurer has initially provided a defense to insured based on four-corners rule, and then Ct focuses on extrinsic evidence in a coverage hearing (i.e., summary judgment, declaratory judgment, or trial), insurer's duty to *continue* to defend is contingent on Ct's determination that insured has coverage if plaintiff proves case

Plastics Eng'g Co v
Liberty Mut Ins Co
2009 WI 13, ¶ 51
315 Wis. 2d 556

4) Once liability policy is triggered by injury during policy period, insurer must fully defend the lawsuit in its entirety even if alleged injury did not occur entirely within a policy period

Anderson v
Kayser Ford, Inc
2019 WI App 9, ¶¶ 24–27
386 Wis. 2d 210

5) Duty to defend continues even if covered claim is dismissed before final order, because claim could be revived on appeal

C. Standards for determining duty

Fireman's Fund Ins Co of Wis v Bradley Corp
2003 WI 33, ¶ 20
261 Wis. 2d 4

1) Duty to defend is broader than duty to indemnify because duty to defend is triggered by arguable, not actual, coverage

Johnson Controls, Inc v Employers Ins of Wausau
2003 WI 108
264 Wis. 2d 60 (overruling *City of Edgerton v Gen Cas Co of Wis*
184 Wis. 2d 750 (1994))

Duty to defend in cases under CERCLA is triggered by receipt of potentially responsible party (PRP) letter seeking remediation or remediation costs

Red Arrow Prods Co v Employers Ins
2000 WI App 36
233 Wis. 2d 114

2) Duty to defend exists if existence of coverage is "fairly debatable"

a. Coverage is fairly debatable if genuine dispute over status of law or facts exists at time of tender of defense

US Fire Ins v Good Humor Corp
173 Wis. 2d 804
(Ct. App. 1993)

b. "Fairly debatable" standard measured from a reasonable insurer's point of view, but policy language is still tested not by what insurer intended, but by what reasonable insured would understand words to mean

Johnson Controls, Inc v London Mkt
2010 WI 52, ¶¶ 42, 43
325 Wis. 2d 176

3) Duty of excess insurer to defend may be created by excess policy's "follow form" provision

Est of Logan v Nw Nat'l Cas Co
144 Wis. 2d 318 (1988)

D. Insurer that defends insured without reserving its rights waives all policy defenses "if it has exercised its dominion over the case at an important point"

E. Breach of duty

Newhouse v Citizens Sec Mut Ins
176 Wis. 2d 824 (1993)
Loosmore v Parent

2000 WI App 117
237 Wis. 2d 679

1) Insurer that breaches duty to defend cannot later contest coverage; insurer is liable for all damages that naturally flow from the breach, including costs of defense, amount recovered by plaintiff from the insured, and any additional consequential damages caused by breach

a. Insurer's liability not limited by policy limits

Towne Realty v
Zurich Ins Co
201 Wis. 2d 260 (1996)

b. Cannot recover legal expenses for costs of prosecuting counterclaim, even if counterclaim arguably necessary to fully defend original suit

§ 806.04(8)
Elliott v Donahue
169 Wis. 2d 310 (1992)

2) Insured may recover reasonable Atty fees incurred in establishing coverage

Reid v Benz
2001 WI 106
245 Wis. 2d 658

But insured may not recover Atty fees expended solely in establishing coverage where there has been no breach of duty to defend

Grube v Daun
173 Wis. 2d 30
(Ct. App. 1992)

3) Right to control defense is lost if insurer breaches duty to defend

F. Withdrawal of defense

Benjamin v Dohm
189 Wis. 2d 352
(Ct. App. 1994)

If insurer agrees to defend insured under reservation of rights, insurer may withdraw unless insured is prejudiced

3. Separating Coverage Issues from Liability Issues

Est of Ermenc v
Am Fam Life Ins Co
221 Wis. 2d 478
(Ct. App. 1998)

A. Insured has initial burden to show coverage, while insurer has burden of proving an exception to coverage

Anderson v Aul
2015 WI 19
361 Wis. 2d 63

1) In a "claims-made-and-reported-policy," failure of insured to give required notice is "per se prejudicial" to insurer and bars recovery

Grigg v Aarowcast, Inc
2018 WI App 17, ¶ 66
380 Wis. 2d 464

2) Prejudice to insurer in the context of an insured's failure to provide notice of a claim is a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense, resulting from the unexcused failure of the insured to provide timely notice

§ 803.04(2)(b)

B. Ct may bifurcate trial

§ 803.04(2)(b)
Liebovich v Minn Ins Co
2008 WI 75, ¶ 55,
310 Wis. 2d 751

1) Upon motion of any party

2) Ct may conduct separate trials

a. On whether insurance policy affords coverage

b. On issue of liability to plaintiff or other parties seeking affirmative relief

3) Ct to specify sequence of trials in the order

Mowry v
Badger State Mut Cas
129 Wis. 2d 496, 514
(1986)

Trial on issue of insurance coverage generally should precede trial on other issues in case

Newhouse v
Citizens Sec Mut Ins Co
176 Wis. 2d 824 (1993)

4) Proper procedure for insurance company to follow when coverage is disputed is to request bifurcated trial and move to stay proceedings on liability until coverage resolved

§ 806.04(2)
Liebovich v Minn Ins Co
2008 WI 75, ¶ 55
310 Wis. 2d 751

C. Summary judgment or declaratory judgment an appropriate method to determine coverage

Fire Ins Exch v Basten
195 Wis. 2d 260
(Ct. App. 1995)
rev'd on other grounds
202 Wis. 2d 74 (1996)

1) When insurer not named as party, preferred practice is to resolve coverage in context of underlying lawsuit by allowing intervention and bifurcation. But separate declaratory judgment action on coverage issue by nonparty insurer is permissible

Fire Ins Exch v Basten
202 Wis. 2d 74 (1996)

2) If declaratory judgment action used, parties in the underlying lawsuit bringing claims against the insured must be joined as interested parties under § 806.04(11)

Reid v Benz
2001 WI 106
245 Wis. 2d 658
Elliott v Donahue
169 Wis. 2d 310 (1992)

D. Consider stay of proceedings on liability until coverage issue resolved

4. Liability Insurance and Damages

§ 344.33(2), *as amended by* 2011 Wis Act 14, §§ 7–10

NOTE: Minimum liability limits are $25,000/$50,000/$10,000.

Kraemer Bros v US Fire Ins Co
89 Wis. 2d 555 (1979)

A. Damages covered

1) When claim consists of variety of acts, some of which are covered under policy and some not, liability falls within terms of policy unless uncovered risk is sole cause of damages

Valley Bancorp v Auto Owners Ins Co
212 Wis. 2d 609
(Ct. App. 1997)

2) Burden is on insurer to establish that conduct giving rise to damages is uncovered

Am Fam Mut Ins Co v Am Girl, Inc
2004 WI 2, ¶ 86
268 Wis. 2d 16
St v Hydrite Chem Co
2005 WI App 60, ¶ 23
280 Wis. 2d 647

3) Known loss doctrine holds insurers are not obligated to cover losses that are already occurring when coverage is being written or that have already occurred

B. Environmental remediation damages

Johnson Controls, Inc v Employers Ins of Wausau
2003 WI 108
264 Wis. 2d 60
(*overruling*
City of Edgerton v Gen Cas Co of Wis
184 Wis. 2d 750 (1994))

1) CERCLA response costs are “damages” covered under CGL policies, provided other policy exclusions do not apply

2) Includes CERCLA remediation costs

a. If insured incurs costs directly, in response to government directive, OR

b. If insured liable for reimbursement of third party's response costs

Brown v Maxey
124 Wis. 2d 426, 442
(1985)

C. Punitive damages

1) Standard liability policy providing coverage for "all sums which the insured shall become legally obligated to pay as damages" includes punitive damages

However, punitive damages may be specifically excluded under some policies

Davis v
Allied Processors, Inc
214 Wis. 2d 294
(Ct. App. 1997)

2) Primary coverage should first be exhausted by compensatory damages before punitive damages are paid

May result in excess carrier avoiding payment because of punitive damages exclusion in excess policy

Brown v Maxey
124 Wis. 2d 426, 446
(1985)

3) Liability coverage for punitive damages not against public policy

Burns v Milw Mut Ins Co
121 Wis. 2d 574
(Ct. App. 1984)

However, against public policy to allow plaintiffs to recover punitive damages under their own indemnity coverage for uninsured/underinsured motorists

Cieslewicz v
Mut Serv Cas Ins Co
84 Wis. 2d 91 (1978)

D. Statutorily imposed treble damages are covered under a standard liability insurance policy

5. Bad Faith by Insurer

Dahmen v
American Fam Ins
2001 WI App 198
247 Wis. 2d 541

A. Claim for benefits and claim for bad faith should be tried separately to avoid prejudice and jury confusion

Brethorst v. Allstate
Prop & Cas Ins Co
2011 WI 41, ¶¶ 5, 76–81,
334 Wis. 2d 23

B. Insured may file first-party bad-faith claim without also filing breach-of-contract claim, but may not proceed with discovery unless satisfies Ct that breach occurred

McEvoy v Group Health Coop of Eau Claire
213 Wis. 2d 507 (1997)
Anderson v Cont'l Ins Co
85 Wis. 2d 675 (1978)

C. Damages for bad faith by insurer (includes HMOs)

Jones v Secura Ins Co
2002 WI 11, ¶ 34
249 Wis. 2d 623

1) Measure is any damages that are the proximate result of insurer's bad faith, including damages otherwise recoverable in breach-of-contract action

2) Tort separate from any breach of contract

Fehring v Republic Ins Co
118 Wis. 2d 299, 313 (1984),
overruled in part by DeChant v Monarch Life Ins Co
200 Wis. 2d 559 (1996)

3) Test: Would a reasonable insurer under particular facts and circumstances have denied or delayed payment of claim?

Anderson v Cont'l Ins Co
85 Wis. 2d 675, 691 (1978);
see also Mowry v Badger St Mut Cas Co
129 Wis. 2d 496, 516–17 (1986)

4) Insurer entitled to deny fairly debatable claim whether debate concerns a matter of fact or law

Rhiel v Wis Cty Mut Ins Corp
212 Wis. 2d 46
(Ct. App. 1997)

Plaintiff's insistence on payment of policy limits may excuse insurer from making any offer at all

Majorowicz v Allied Mut Ins Co
212 Wis. 2d 513, 528
(Ct. App. 1997)

5) Insurer's duty of good faith is nondelegable, making it vicariously liable for actions of its Atty

6) Intent to cause emotional distress need not be shown

Trinity Evangelical Lutheran Church v Tower Ins Co
2002 WI App 46, ¶ 29
251 Wis. 2d 212, *rev'd in part, aff'd in part*
2003 WI 46, ¶ 45
261 Wis. 2d 333

7) Punitive damages available but do not necessarily follow from proof of bad faith

Kranzush v Badger
State Mut Cas Co
103 Wis. 2d 56, 73–82
(1981)

8) Tortfeasor's insurer has no liability to a 3rd-party claimant for insurer's failure to settle a claim

Est of Plautz
v Time Ins Co
189 Wis. 2d 136, 145
(Ct. App. 1994)

However, life insurance beneficiary may maintain bad-faith action against an insurer for unreasonableness in investigation and handling of claim

Anderson v Cont'l Ins Co
85 Wis. 2d 675 (1978)

9) To recover for emotional distress, plaintiff must

a. Plead and prove intentional infliction of emotional distress, or

b. Plead and prove substantial damages apart from the emotional distress and the damages from the breach of contract, AND

c. Prove severe emotional distress

Weiss v
United Fire & Cas Co
197 Wis. 2d 365, 374
(1995)

10) Expert testimony not required in all cases to prove bad faith. Bright-line test rejected

DeChant v
Monarch Life Ins Co
200 Wis. 2d 559, 577
(1996)
Allied Processors, Inc
v Western Nat'l Mut
Ins Co
2001 WI App 129
246 Wis. 2d 579

11) Atty fees, bond premiums, and expert witness fees are recoverable as damages

Majorowicz v
Allied Mut Ins Co
212 Wis. 2d 513, 536–37
(Ct. App. 1997)

a. No recovery allowed for Atty fees in proving punitive damages

Stewart v
Farmers Ins Grp
2009 WI App 130, ¶ 14
321 Wis. 2d 391

b. Atty fees are damages, not costs, in bad-faith claim

Caporali v
Washington Nat'l Ins
102 Wis. 2d 669, 684–85
(1981)

12) Compensatory damages may include a present value lump-sum payment representing periodic payments due under policy

Pierringer v Hoger
21 Wis. 2d 182 (1963)

6. *Pierringer* Release

A. Purpose

Avoids rule that release of one joint tortfeasor releases all joint tortfeasors and allows settlement and release of claims against one or more joint tortfeasors without releasing claim against nonsettling tortfeasors

Pierringer v Hoger
21 Wis. 2d 182 (1963)

B. Elements

1) Plaintiff's release contains a reservation of rights against one or more of the nonsettling tortfeasors

2) Plaintiff agrees to credit amount of judgment attributed to negligence of settling tortfeasor against any judgment nonsettling tortfeasors may be required to pay

VanCleve v
City of Marinette
2003 WI 2
258 Wis. 2d 80

3) Nonsettling tortfeasors liable only for their share of the causal negligence

4) Nonsettling tortfeasor cannot object to claimant's settlement with another tortfeasor

St Clare Hosp v Schmidt,
Garden, Erickson Inc
148 Wis. 2d 750
(Ct. App. 1989)

C. Caution

1) Release of one Def from liability for a "defective" product may release all whose liability is based on claim of strict liability in tort

Fleming v Threshermen's
Mut Ins Co
131 Wis. 2d 123 (1986)

2) *Pierringer* release of intentional tortfeasor releases a negligent tortfeasor as well since the negligent tortfeasor's right to recover from the intentional tortfeasor is based on indemnity, not contribution

D. Effect of settlement at trial

1) Released tortfeasor must be included in verdict to determine percent of causal negligence attributable between tortfeasors

§ 904.08
Hareng v Blanke
90 Wis. 2d 158 (1979)

2) Evidence of settlement *not* admissible to prove liability or damages

Hareng v Blanke
90 Wis. 2d 158 (1979)

3) Evidence of settlement can be used to prove possible bias of witness although it cannot be used to prove liability or invalidity of claim at issue

Johnson v Heintz
73 Wis. 2d 286 (1976)

4) Release of claim against a Def requires that Def be dismissed from action

Johnson v Heintz
73 Wis. 2d 286 (1976)

5) Testimony relative to amount of settlement between Defs and plaintiffs not admissible

6) Testimony relative to fact of settlement and alignment of settling parties is admissible

E. Variant on *Pierringer*—The *Loy* release

Loy v Bunderson
107 Wis. 2d 400 (1982)

1) Releases tortfeasor and tortfeasor's primary insurer to extent of policy limits even though settlement is less than limits under primary policy

2) Plaintiff retains right to pursue additional Defs, settling tortfeasor, and other insurers of settling tortfeasor

3) Plaintiff agrees to credit nonsettling Defs and settling tortfeasor with policy limits on primary coverage

4) Other insurers of settling tortfeasor may be required to defend and indemnify unless primary coverage required as condition of their liability

7. Uninsured Motorist Coverage (UM)

A. Purpose

Hull v St Farm
Mut Auto Ins Co
222 Wis. 2d 627 (1998)

1) Legislative purpose of § 632.32(4) is to place insured in same position as if uninsured motorist were insured

Est of Dorschner v St
Farm Mut Auto Ins Co

2001 WI App 117
244 Wis. 2d 261

a. But purpose is subject to anti-stacking provisions of § 632.32(5)

§ 631.43(3), *as amended by* 2011 Wis Act 14, § 12

NOTE: Effective November 1, 2011, anti-stacking clauses in policies are permitted.

Calbow v Midwest Sec Ins Co
217 Wis. 2d 675
(Ct. App. 1998)

b. Insured who has been fully compensated for injuries from other sources, not entitled to additional recovery under UM benefits

§ 632.32(4)(a)

B. Every insurance policy, excluding umbrella and excess liability policies, must provide

1) Protection of persons injured who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death

§ 632.32(4)(a)

2) Coverage must be at least $25,000 per person and $50,000 per accident

§ 632.32(4)(a)

3) Minimum medical payments coverage is $1,000 per person

Hull v State Farm Mut Auto Ins Co
222 Wis. 2d 627 (1998)

4) Sec. 632.32(4) requires coverage whenever either the owner or the operator of a motor vehicle is allegedly negligent and is not covered by liability insurance

5) Coverage when unidentified motor vehicle involved in hit-and-run accident

§ 632.32(2)(g)2., *as repealed and recreated by* 2011 Wis Act 14, § 17; *see also* § 632.32(2)(bh), *as created by* 2011 Wis Act 14, § 14

The definition of an "uninsured motor vehicle" includes a phantom motor vehicle causing accident without physical contact if corroboration by other than insured (or any other person who makes UM claim as result of accident) and timely notice to police and insurer. A "phantom motor vehicle" is one for which identity of neither its owner nor operator can be ascertained

2011 Wis Act 14, § 22

NOTE: Effective November 1, 2011, 2011 Wis. Act 14 repealed § 632.32(4r) and its requirement that holder of an umbrella or excess liability policy reject, in writing, an offer of UM coverage.

§ 631.43(1)

C. When there are two or more policies

1) No "other insurance" provisions of the policy may reduce aggregate protection of the insured below lesser of actual insured loss suffered or total indemnification promised by policies if there were no "other insurance" provisions

Martin v Am Fam Mut Ins Co
2002 WI 40
252 Wis. 2d 103

Statute applies only when two or more insurance policies promise to indemnify insured against same loss

Nicholson v Home Ins Cos
137 Wis. 2d 581 (1987)

2) Policies may define extent to which each is primary and each excess

3) If policies contain inconsistent terms, insurers shall be jointly and severally liable to insured on any coverage when terms are inconsistent

Each liable to full amount of coverage it provided

4) Settlement among insurers shall not alter any rights of insured

D. Characteristics of UM coverage

§ 632.32(4)
Trampf v Pruden Prop & Cas
199 Wis. 2d 380
(Ct. App. 1996)

1) Language of policy may not restrict coverage under UM statute

Fletcher v Aetna Cas & Sur Co
165 Wis. 2d 350
(Ct. App. 1991)

a. But policy, not statute, determines coverage beyond statutory requirements

b. Extent of coverage governed by ability of injured party to recover from insurance company of responsible party

Schwochert v Am Fam Mut Ins Co
139 Wis. 2d 335 (1987)

2) Not available if plaintiff recovered from insured motorist or estate of UM

Blum v 1st Auto & Cas Ins Co
2010 WI 78, ¶ 38
326 Wis. 2d 729
(interpreting § 632.32(4)(2005–06))

3) In certain situations, the statute may not mandate UM coverage in the absence of negligence by the uninsured party

WEA Ins Corp v Freiheit
190 Wis. 2d 111

(Ct. App. 1994)

4) UM policy provisions may not eliminate right of subrogation

§ 632.32(5)(c)
Blazekovic v
City of Milwaukee
2000 WI 41
234 Wis. 2d 587
Clark v
Am Fam Mut Ins Co
218 Wis. 2d 169 (1998)

E. Validity of exclusions

1) Exclusion is valid unless prohibited under two-part test of Omnibus Statute, § 632.32

a. Does exclusion fit enumerated prohibitions of § 632.32(6)?

b. Does any other applicable law prohibit the exclusion?

Mau v N Dakota Ins
Reserve Fund
2001 WI 134, ¶¶ 35–36
248 Wis. 2d 1031
Blazekovic v
City of Milwaukee
2000 WI 41
234 Wis. 2d 587

2) "Drive other car" exclusion prohibited unless it meets all conditions under § 632.32(5)(j)

a. Motor vehicle is owned by named insured, or relative residing with named insured

b. Motor vehicle is not described in policy

c. Motor vehicle is not covered under terms of policy as newly acquired or replacement vehicle

F. Stacking coverage—"Anti-Stacking" and Reducing Clause Rules

§ 632.32(5)(f)–(j)

1) Sec. 632.32(5)(f)–(j) permits anti-stacking and reducing clauses in insurance policies

Badger Mut Ins Co
v Schmitz
2002 WI 98
255 Wis. 2d 61

Statute overturned prior appellate decisions holding that policy could not prohibit stacking of UM or UIM coverage

§ 632.32(5)(f)

2) Policy may provide that limits for any coverage under the policy may not be added to limits for similar coverage applying to other motor vehicles

§ 632.32(5)(g)

3) Policy may provide that UM or UIM coverage for person injured while not using motor vehicle is determined by selecting policy person owns with highest amount of coverage

§ 632.32(5)(g)

4) Policy may provide that maximum amount of medical payments coverage for person injured while not using motor vehicle is policy with highest single limit of med pay coverage

§ 632.32(5)(i)

5) UM and UIM policies may provide that limits for bodily injury or death resulting from any one accident shall be reduced by

§ 632.32(5)(i)1.

a. Amounts paid by or on behalf of anyone legally responsible for the loss

Marotz v Hallman
2007 WI 89
302 Wis. 2d 428
Janssen v State Farm Mut Auto Ins Co
2002 WI App 72
251 Wis. 2d 660

- Sec. 632.32(5)(i) refers to amounts paid by or on behalf of tortfeasors, and not to payments from another UM carrier

Dowhower v West Bend Mut Ins Co
2000 WI 73
236 Wis. 2d 113

— UIM reducing clauses complying with § 632.32(5)(i) are valid, provided that policy clearly sets forth that insured is purchasing level of UIM recovery that will be arrived at by combining payments made from all sources

Myers v General Cas Co of Wis
2005 WI App 49
279 Wis. 2d 432

— There is no "magic language" required by § 632.32(5)(i), and reducing clause does not have to mirror the language of the statute

Welin v Am Fam Mut Ins Co
2006 WI 81, ¶ 8
292 Wis. 2d 73

— Clause is invalid if more than one person is injured and injured persons are not insured under same UIM policy

Progressive Northern Ins Co v Kirchoff
2008 WI App 108
313 Wis. 2d 138

— Clause permits two independent UIM carriers, with two separate policies insuring one person, to each reduce their UIM coverages by the limit paid by a single tortfeasor

§ 632.32(5)(i)2.

b. Amounts paid under worker's compensation law

Sukala v
Heritage Mut Ins Co
2000 WI App 266
240 Wis. 2d 65

- *Dowhower* analysis applies

§ 632.32(5)(i)3.

c. Amounts paid under disability benefits laws

Sukala v
Heritage Mut Ins Co
2000 WI App 266
240 Wis. 2d 65

- *Dowhower* analysis applies

8. Underinsured Motorist Coverage (UIM)

Meyer v
Michigan Mut Ins Co
2000 WI App 37
233 Wis. 2d 221

A. Purpose and requirements

§ 632.32(4m), *as created by* 2011 Wis Act 14, § 21m

NOTE: Effective November 1, 2011, drivers are not required to carry UIM coverage.

2011 Wis Act 14, § 22

NOTE: Effective November 1, 2011, 2011 Wis. Act 14 repealed § 632.32(4r) and its requirement that a holder of an umbrella or excess liability policy reject, in writing, an offer of UIM coverage.

§ 632.32(5)(f), (g), (i), *as affected by* 2011 Wis Act 14, §§ 23, 24, 26

NOTE: Effective November 1, 2011, anti-stacking clauses and reducing clauses are permitted in UM/UIM policies.

Badger Mut Ins Co
v Schmitz
2002 WI 98
255 Wis. 2d 61

1) Two conflicting theories regarding purpose of UIM coverage

State Farm Mut Auto Ins
Co v Gillette
2002 WI 31
251 Wis. 2d 561

a. To compensate insured if tortfeasor's policy liability limits do not adequately compensate for insured's injuries

Pitts v Revocable
Trust of Knueppel
2005 WI 95, ¶ 29
282 Wis. 2d 550

b. To put insured in same position that insured would have occupied had tortfeasor's liability limits been the same as UIM limits purchased by insured

§ 632.32(4m)(d)

2) If an insured purchases UIM coverage, minimum amounts are $50,000 per person and $100,000 per accident.

B. Definition

1) "Underinsured motorist" not defined in statute

See 2011 Wis Act 14, § 15c (repealing § 632.32(2)(e) (2009–10))

NOTE: Individual policies may define UIM coverage.

State Farm Mut Auto Ins Co v Langridge
2004 WI 113
275 Wis. 2d 35

2) Insurance companies are free to establish UIM definitions by comparing coverage of tortfeasor with UIM coverage of insured, rather than through comparison of tortfeasor's coverage with damages sustained by insured

Smith v Atlantic Mut Ins Co
155 Wis. 2d 808 (1990)

a. UIM definition that compares liability limits of insured and other vehicle not ambiguous and is enforceable

State Farm Mut Auto Ins Co v Langridge
2004 WI 113
275 Wis. 2d 35

- Example: Defining underinsured vehicle as one whose liability limits are less than limits of insured's UIM coverage

C. Determination of coverage

Smith v Atlantic Mut Ins Co
155 Wis. 2d 808 (1990)

1) Ct must first determine that tortfeasor meets definition of UIM before examining whether other clauses in policies affect UIM coverage

Taylor v Greatway Ins Co
2001 WI 93
245 Wis. 2d 134

Reducing clause does not affect UIM definition itself

Engstrom v MSI Ins Co
198 Wis. 2d 195
(Ct. App. 1995)

2) Multiple policies considered individually for purposes of UIM coverage

Meyer v Michigan Mut Ins Co
2000 WI App 37
233 Wis. 2d 221

But insured's primary and umbrella policies may be considered together for determining coverage

Brunson v Ward
2001 WI 89
245 Wis. 2d 163

3) If UIM coverage in policy does not conform to statute, statutory coverage is "read in" to policy

Pierce v Mid-Century Ins Co
2016 WI App 79, ¶ 21
372 Wis. 2d 171

4) UIM benefits cannot be used to confer additional liability benefits for passengers in negligent driver's insured car

Schwochert v Am Fam Ins Co
139 Wis. 2d 335 (1987)

D. UIM coverage is not personal and not portable

E. Anti-Stacking or Reducing Clause Rules, see Sec. 7.F., *supra*

9. Collateral Source Rule

A. In general

Koffman v Leichtfuss
2001 WI 111
246 Wis. 2d 31
Rixmann v Somerset Pub Sch
83 Wis. 2d 571 (1978)

1) Personal-injury claimant's recovery not to be reduced by amount of compensation received from sources other than tortfeasor

Leitinger v DBart, Inc
2007 WI 84, ¶ 26
302 Wis. 2d 110

2) Generally, evidence regarding the amount of benefits a claimant obtained from sources collateral to the tortfeasor is not admissible

B. Benefits subject to collateral source rule

Rixmann v Somerset Pub Sch
83 Wis. 2d 571 (1978)

1) Medical expenses paid by an insurance company under an investment contract without a contractual right of subrogation

Thoreson v Milw & Suburban Transp Corp
56 Wis. 2d 231 (1972)

2) Reasonable value of gratuitous nursing and medical services

Plaintiff's recovery is for value of services rendered and not for expenditures actually made or obligations incurred

Merz v Old Rep Ins Co
53 Wis. 2d 47 (1971)

3) Medical expenses paid by Medicare

Ellsworth v Schelbrock
2000 WI 63
235 Wis. 2d 678

4) Medical Assistance payments

Cunnien v
Sup Iron Works
175 Wis. 172 (1921)

5) Loss of earnings when employer continued to pay plaintiff's wages during inability to perform services

Campbell v Sutcliff
193 Wis. 370 (1927)

6) When plaintiff receives wage replacement benefits under disability policy of insurance, amount paid not reduced by plaintiff's damage award

Employers Health Ins
v Gen Cas
161 Wis. 2d 937 (1991)

7) Medical insurer not subrogated to payments through uninsured motorist coverage since these payments are not paid to the insured on behalf of tortfeasor

City of Milwaukee
v NL Indus, Inc
2008 WI App 181
315 Wis. 2d 443

8) Federal and State grants received

C. Circumstances in which collateral source rule does not apply

Koffman v Leichtfuss
2001 WI 111
246 Wis. 2d 31
Lambert v Wrensch
135 Wis. 2d 105 (1987)
Est of Otto v
Physicians Ins Co of Wis
2007 WI App 192, ¶ 32
305 Wis. 2d 198
aff'd on other grounds,
2008 WI 78
311 Wis. 2d 84

1) When there is express subrogation clause in an insurance contract and insurer is barred from pursuing its subrogation rights

Fischer v. Steffen
2011 WI 34
333 Wis. 2d 503
Koffman v Leichtfuss
2001 WI 111
246 Wis. 2d 31

a. BUT when risk for double recovery by plaintiff does not exist (i.e., if insurer not barred from pursuing subrogation right), collateral source rule applies

Cunningham v
Metropolitan Life Ins
121 Wis. 2d 437 (1985)

2) Absent an express subrogation clause, determination must be made as to whether contract is an investment contract or an indemnity contract

a. If contract is an indemnity contract, insurance company has a right to subrogation

b. If insurance contract is an investment contract, insurance company is denied the right to subrogation

WG Slugg Seed &
Fertilizer, Inc v
Paulsen Lumber
62 Wis. 2d 220 (1974)

3) In contract claims

a. Def's liability for damages for breach of contract determined as of date of breach

b. Subsequent collateral recovery by plaintiff will not reduce amount of Def's liability

4) When statutory provisions provide for subrogation, collateral source rule not available

§ 102.29

a. Right of subrogation for worker's compensation benefits paid by insurance carrier

42 USC § 1395y(b)(1)

b. Right of subrogation for Medicare payments

§ 49.89(2)

c. Right of subrogation for public assistance benefits paid

§ 605.24(1), (3)

d. AG may pursue actions against third parties who have caused damage to property of local governments covered by Local Government Property Insurance Fund

§ 632.32(4)(c);
see also § 632.32(2)(am)
(defining *medical*
payments coverage)

e. Insurers that make payment under any coverages under § 632.32(4) are subrogated to rights of their insureds to extent of payment made

§ 949.15

f. When DOJ makes payment to crime victims under Subch I of Ch 949 (*see* §§ 949.001–.18), it is subrogated to applicant's cause of action against person responsible for injury or death in amount of damages sustained by applicant

§ 893.55(7)
Lagerstrom v
Myrtle Werth
Hosp–Mayo Health Sys

2005 WI 124, ¶ 5
285 Wis. 2d 1

5) Special rules apply in medical malpractice cases

10. Subrogation

Committee Comment

Note: For summary of subrogation law see *Muller v Society Ins*, 2008 WI 50, ¶¶ 22–25, 309 Wis. 2d 410.

A. Nature of claim

Ruckel v Gassner
2002 WI 67
253 Wis. 2d 280

1) Subrogation right puts insurer in position of insured to pursue recovery from third parties responsible for the loss

Koffman v Leichtfuss
2001 WI 111
246 Wis. 2d 31

2) Where insured receives payments from insurer, insurer obtains subrogation right to extent it has made such payments

But claim to any additional expenses remains with plaintiff

Houle v
School Dist of Ashland
2003 WI App 214, ¶ 8
267 Wis. 2d 708

3) Three main types of subrogation: conventional, legal/equitable, and statutory

B. Subrogated carrier as party to action

§ 803.03(2)

1) Joinder of subrogated carrier required

§ 803.03(2)(a)

2) Parties who have claims arising by subrogation, derivation, and assignment must be joined by party asserting claim for affirmative relief

§ 803.03(2)(b)
Radloff v General Cas Co
147 Wis. 2d 14
(Ct. App. 1988)

3) After joinder, party joined must choose one of three options under statutes or risk losing its subrogation rights

a. Participate in action

b. Agree to have interest protected by party causing joinder

c. Move for dismissal

§ 803.03(2)(bm)

4) If DHS joined, it need not sign waiver to have interests represented by party that caused joinder

If DHS makes no selection under para. 3) above, party causing joinder to represent DHS interest and DHS bound by judgment

§ 803.03(2)(c)

5) At scheduling and pretrial conferences, Judge shall inquire about existence of and joinder of persons with subrogated rights and shall make such orders as necessary to effectuate purposes of § 803.03

C. Effect on plaintiff for failure to join a subrogated carrier

Lambert v Wrensch
135 Wis. 2d 105 (1987)

1) If plaintiff fails to name subrogated carrier

a. Def can prevent medical bills paid by subrogated carrier from being introduced into evidence

b. Plaintiff is not proper party to produce medical bills paid by subrogated carrier

Bruner v Kops
105 Wis. 2d 614
(Ct. App. 1981)
Heifetz v Johnson
61 Wis. 2d 111 (1973)

2) Failure to join subrogated carrier, a necessary party, is not basis for dismissal of plaintiff's claim without an examination by Trial Ct

D. When statute of limitation has run as to subrogated carrier's claim

Gen Acc Ins v
Schoendorf & Sorgi
202 Wis. 2d 98 (1996)

1) Statute of limitation on subrogation claim is the statute of limitation on underlying tort

Koffman v Leichtfuss
2001 WI 111
246 Wis. 2d 31
Lambert v Wrensch
135 Wis. 2d 105 (1987)

2) Fact that subrogated carrier barred from pursuing subrogated interest does not give plaintiff right to recover from tortfeasor for medical expenses paid on plaintiff's behalf under subrogated carrier's policy

Est of Otto v
Physicians Ins Co of Wis
2007 WI App 192, ¶ 32
305 Wis. 2d 198
aff'd on other grounds
2008 WI 78
311 Wis. 2d 84

3) Plaintiff cannot exclude evidence of insurance payments that subrogated carrier paid under its policy on behalf of plaintiff

Def has right to show that medical expenses were paid by subrogated carrier

4) Plaintiff not entitled to instruction on collateral source rule

5) Double recovery not allowed under principles of subrogation

Voge v Anderson
181 Wis. 2d 726 (1994)

But when insurer has waived its right to subrogation, collateral source rule applies to allow recovery from tortfeasor as well

6) Although carrier holds subrogated interest, failure to timely answer complaint may bar claim even if principal claim is timely

Bruner v Kops
105 Wis. 2d 614, 624–25
(Ct. App. 1981)

a. However, if injured party brings principal action in timely manner, subrogated claim may be joined and relate back to commencement of main action. The necessary party, the subrogated carrier, can be named and both the principal and subrogated claims can be pursued

Aetna Cas & Sur Co
v Owen
191 Wis. 2d 744, 748–50
(Ct. App. 1995)

b. But filing of principal claim does not "toll" statute to allow an independent subrogation claim by insurer. Once statute of limitation has run on subrogation claim, action can be maintained only by joining existing lawsuit

E. Effect on Def when subrogated carrier not named as party

Blue Cross &
Blue Shield United v
Fireman's Fund Ins Co
140 Wis. 2d 544 (1987)

1) Failure to join subrogated carrier may ultimately result in Def having to pay both plaintiff and subrogated carrier

a. Through subrogation, carrier is given part of cause of action to extent of payments made

b. Release of tortfeasor by injured party does not release tortfeasor from separate claim of subrogated carrier. (But see *Schulte v Frazin*, 176 Wis. 2d 622 (1993), discussed in **Sec. 10.F.** below)

Blue Cross &
Blue Shield United v
Fireman's Fund Ins Co
140 Wis. 2d 544 (1987)

2) Subrogated carrier entitled to pursue claim against Def in own name

3) Subrogated carrier's separate and distinct part of cause of action not affected by any settlement and release entered into by injured party

F. Effect of settlement on subrogation right

Muller v Society Ins
2008 WI 50, ¶¶ 26, 87,
309 Wis. 2d 410
Rimes v
St Farm Mut Auto Ins
106 Wis. 2d 263 (1982)

1) Insured usually must be made whole by settlement in order for subrogated insurer to be paid from settlement proceeds

Ruckel v Gassner
2002 WI 67
253 Wis. 2d 280

"Made whole" doctrine applies even when unambiguous language in insurance contract states otherwise

2) Issue whether insured made whole may require a trial

Sorge v
Nat'l Car Rental Sys
182 Wis. 2d 52 (1994)

3) Insured is made whole when insured receives all damages he or she is legally entitled to, less the amount corresponding to his or her negligence even if that negligence is greater than 50%

Ives v Coopertools
208 Wis. 2d 55 (1997)

Caution: Read *Sorge* in light of *Ives v Coopertools*

Schulte v Frazin
176 Wis. 2d 622 (1993)
Rimes v
St Farm Mut Auto Ins
106 Wis. 2d 263 (1982)

4) Settlement by insured at less than full value without involvement of the subrogated carrier does not defeat subrogated carrier's claim unless plaintiff has agreed to indemnify Def for any liability to the subrogated carrier and Ct has, at *Rimes* hearing, determined that plaintiff was not made whole and subrogated carrier was given chance to participate in that determination

Muller v Society Ins
2008 WI 50, ¶¶ 26, 87,
309 Wis. 2d 410

Equitable principles govern. In rare cases, an insured need not be made whole

Vogt v Schroeder
129 Wis. 2d 3 (1986)

5) UIM subrogation rights

Pitts v Revocable
Trust of Knueppel
2005 WI 95, ¶ 49
282 Wis. 2d 550

a. Underinsurer has right of subrogation against underinsured tortfeasor when underinsurer makes partial payment of insured's damages before insured's release of tortfeasor

- Insured must give notice of potential settlement to underinsurer (*Vogt* notice)

Ranes v
Am Fam Mut Ins Co
219 Wis. 2d 49 (1998)

- But failure to give *Vogt* notice does not bar UIM claim if insured can prove UIM carrier not prejudiced by lack of notice

Jones v Gen Cas Co
218 Wis. 2d 790
(Ct. App. 1998)

b. Underinsurer may collect from wrongdoer only through subrogation, not indemnification claim

Petta v ABC Ins Co
2005 WI 18
278 Wis. 2d 251

6) Settling claimants that are not insureds of subrogee insurer can defeat insurer's subrogation claim by applying "made whole" doctrine

Dufour v Progressive
Classic Ins Co
2016 WI 59
370 Wis. 2d 313

7) Made-whole rule does not preclude subrogated auto insurer from recovering subrogated funds for vehicle damage from tortfeasor's liability carrier if plaintiff has settled the bodily injury claim with that carrier before plaintiff's insurer pursues subrogation

Employers Mut Cas Co
v Kujawa
2015 WI App 26
361 Wis. 2d 213

8) Made-whole rule applies when plaintiff unilaterally settles a claim for less than the policy limit if the insured acted in good faith in procuring a settlement

Newport News Shipbldg
Co v THE Ins Co
187 Wis. 2d 364
(Ct. App. 1994)

9) But note: Benefit plans governed by ERISA not subject to "made whole" subrogation rule if plan provides otherwise

a. Right of plan beneficiary to be made whole before plan can recoup payments exists only when the parties are silent

Kavelaris v MSI Ins Co
2001 WI App 161
246 Wis. 2d 899

b. However, when ERISA plan is insured under policy regulated by Wis law, ERISA does not preempt "made whole" doctrine

Ch 655

G. Subrogation rights of Injured Patients and Families Compensation Fund

Patients Comp Fund v Lutheran Hosp-LaCrosse, Inc
223 Wis. 2d 439 (1999)

Fund's subrogation rights limited to claims against health-care provider or health-care provider's insurer

Leonard v Dusek
184 Wis. 2d 267
(Ct. App. 1994)

H. Common-law subrogation principles inapplicable in three areas

§ 49.89
Waukesha Cty v Johnson
107 Wis. 2d 155
(Ct. App. 1982)

1) Medical Assistance payments reimbursable even though recipients not made whole

§ 102.29
Martinez v Ashland Oil, Inc
132 Wis. 2d 11
(Ct. App. 1986)

2) Worker's compensation payments

Petro v DWG Corp
148 Wis. 2d 725
(Ct. App. 1989)

3) ERISA actions

Subject to **Sec. 10.F.**9)b. above

CV 49: BANKRUPTCY AND RECEIVERSHIP OVERVIEW

COMMITTEE NOTE: In the interests of comity and efficiency, Wisconsin bankruptcy judges welcome and encourage state judges to call their chambers directly on legal matters. The highest priority is given to fellow judges and their law clerks.

Hon. Catherine J. Furay, Western District of Wisconsin, 608-264-5188

Hon. G. Michael Halfenger, Eastern District of Wisconsin, 414-290-2680

Hon. Beth E. Hanan, Eastern District of Wisconsin, 414-290-2650

Hon. Katherine M. Perhach, Eastern District of Wisconsin, 414-290-2660

Hon. Rachel M. Blise, Eastern District of Wisconsin, 414-290-2670

BANKRUPTCY

1. Introduction

US Const Art 1, § 8
US Const Art VI

A. Constitutional authority

Congress shall have the power to establish uniform laws on the subject of bankruptcies throughout the U.S. To the extent they are inconsistent, federal law supersedes state law

11 USC § 101(13)

B. Definitions (see also Bankruptcy Terms in Sec. 7, *infra*)

1) In bankruptcy proceeding, "debtor" is person or entity that files a voluntary petition or is the subject of an involuntary petition

11 USC § 541
11 USC § 1115
11 USC § 1207
11 USC § 1306

2) "Bankruptcy estate" is property of debtor over which Bankruptcy Ct has jurisdiction, and which may be subject to distribution to creditors. It consists of all property held by debtor at time of filing and, in proceedings under 11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13, future income of debtor earned during the term of the bankruptcy plan

C. Four primary types of proceedings

11 USC Ch 7

1) Chapter 7—Liquidation

11 USC § 726
11 USC § 507

a. All nonexempt property of debtor that is not subject to a creditor's valid security interest and that exists on the date of filing is liquidated by the trustee with creditors paid the proceeds pro rata in accordance with the Bankruptcy Code's priority scheme

- Most cases have no property to be liquidated ("no asset cases")
- Can be filed voluntarily or involuntarily (involuntary cases are very rare)

11 USC § 523

b. Unpaid debts, with certain exceptions, are discharged

11 USC § 707(b)

c. Debtors with consumer debts must fulfill a means test, measuring income against expenses and analyzing whether the law states that the debtors could pay toward their unsecured debts. A debtor who has primarily consumer debts and fails the means test is ineligible to file under 11 USC Ch 7 but may convert to a proceeding under 11 USC Ch 13

d. If debtors earn less than the state median income for their family size, they qualify for proceeding under 11 USC Ch 7

e. If debtors earn more than the state median income, they may still qualify for proceeding under 11 USC Ch 7, but they must pass the "long form" means test. Debtors are allowed to deduct certain expenses—such as taxes, payments on secured debts including cars and mortgages, and IRS-allowed living expenses—against income to determine whether they pass the means test

11 USC Ch 11

2) Chapter 11—Reorganization

a. Used by businesses and individuals

b. Plan of reorganization or liquidation is developed by debtor, but after a certain time may be proposed by other interested parties

c. Debtor usually remains in possession of the property of the estate as a "debtor in possession" and may manage property and operate the business while developing a plan of reorganization

d. Creditors' committee or committees may be appointed to represent various creditors' interests

Jantzen v Baker
131 Wis. 2d 507
(Ct. App. 1986)

e. Disclosure statement is disseminated to creditors who then ascertain the financial picture of the debtor and vote on a plan

- Certain standards have to be met to enable a plan to be confirmed by a Bankruptcy Ct

11 USC §§ 1181–1195

f. New Subch V of Ch 11 is for small businesses

- Intended to streamline Ch 11 cases for small businesses

11 USC § 1182

- Definition of "debtor" based on business's total debt

- In practice, a blend of Ch 11 and Ch 13

11 USC Ch 12

3) Chapter 12—Reorganization

a. Restricted to family farmers and family fishermen with certain debt limitations

b. Blend between Ch 11 and Ch 13

c. Simpler in terms of requirements than Ch 11

d. Payments made to a Ch 12 trustee who makes distributions during plan

e. Voluntary only; cannot be converted to proceeding under 11 USC Ch 7 without debtor's consent unless fraud shown

11 USC Ch 13

4) Chapter 13—Reorganization

a. For individuals, including sole proprietors, with regular income. The debtor's future wages fund a Ch 13 plan of repayment over a period of 3 to 5 years. Income and property limits apply

b. Debtor has duty of good faith in filing case and in proposing plan

11 USC § 1307

c. Voluntary only; cannot be converted to proceeding under 11 USC Ch 7 without debtor's consent, unless exceptions specified in statute apply

d. Only debtor may propose a plan

United Student Aid Funds, Inc v Espinosa 130 S. Ct. 1367 (2010)

- Creditors cannot vote but may object to confirmation; plan is confirmed if debtor meets statutory requirements. If creditor does not object to confirmation and plan is confirmed, creditor can be held to terms of plan even if Ct and debtor did not comply with all rules and statutory procedures for confirmation

11 USC § 1326;
28 USC § 586

- Must pay secured debts and priority claims. May pay long-term secured debts (like mortgages) outside plan. Must pay trustee fees of 10% of total plan payments (limited for family farmers to fees not exceeding $450,000)

11 USC § 1322;
11 USC § 1325

- Debtor must pay into the plan the lesser of: (1) all "projected disposable income"; (2) the balance of unsecured claims; or (3) the value of nonexempt assets. Priority claims, e.g., administrative and attorney fees, must be paid in full

11 USC § 1325(a)(4)

- Unsecured creditors must receive over the life of the Ch 13 plan at least what they would have received in a Ch 7 liquidation. Often unsecured creditors receive nothing

11 USC § 1325(a)(5)(B)

- If a secured creditor objects to the plan and objection is upheld, the debtor must either surrender the collateral to the secured creditor or distribute property with a value, as of the effective date of the plan, of the allowed amount of the secured claim (property may be in the form of payments with interest under the plan)

e. Discharge obtained is only slightly broader than under 11 USC Ch 7

See generally 11 USC § 1328

- Debts arising from certain intentional torts and property division, civil fines, penalties, and forfeitures to governmental units may be discharged, as long as debtor files plan in good faith and other statutory requirements are met

11 USC § 1328

- Criminal fines and restitution, debts arising from willful or malicious injury that causes death or personal injury, domestic support obligations, student loans, and claims for personal injuries caused by drunk driving are not dischargeable

f. Allows debtors to cure arrearages on secured debts over the course of the plan

11 USC § 506

g. Allows debtors to "strip" a junior mortgage from real estate, including debtor's primary residence, if the mortgage attaches to zero equity

Comment

- Some Cts will require debtors to be eligible for a Ch 13 discharge, rather than just filing the case, to use this tool (not all Cts agree on this point)

11 USC § 303

D. Creditors may invoke involuntary bankruptcy against a debtor

1) Creditors may place debtor into bankruptcy (under 11 USC Ch 7 or 11 USC Ch 11 only) when an entity or individual is not paying debts when they become due. Action of the creditors may be contested by the debtor. Number of creditors and dollar amount of debts is prescribed

2) Automatic stay is effective when the petition is filed. After response period, if no response is filed, Ct will enter the order for relief. Debtor may administer its own property in the ordinary course until order for relief is entered

11 USC § 348

E. Conversion from one chapter to another

See, e.g., 11 USC § 727(a)(8);
11 USC § 1328(f)

Debtors and creditors both have right to move Ct for conversion from one chapter to another, subject to discharge time limits

2. Jurisdiction of the Bankruptcy Court

28 USC § 1334(a)

A. District Cts have original and exclusive jurisdiction of all cases under title 11 of the U.S. Code

1) The "case" is the umbrella proceeding under which all other proceedings take place after the filing of a petition

Adversary proceedings, contested matters, suits, actions, or disputes fall under the umbrella: these are "civil proceedings"

2) Day-to-day handling of title 11 cases is referred by the District Ct to the Bankruptcy Ct

28 USC § 1334(b)

B. District Cts have original, but not exclusive jurisdiction over all civil proceedings arising under title 11

1) Original but not exclusive means that Bankruptcy Ct first considers whether it will hear the issue. If Ct wishes to or must abstain, and thereby leave issue to State or federal Ct, it may. *See* paras. 3) and 4) below

2) Federal jurisdictional statutes draw distinction between "core" and "non-core" proceedings

28 USC § 157

a. The Bankruptcy Ct has broad powers in core bankruptcy proceedings. Examples of core proceedings are

- Matters concerning administration of the estate
- Allowance or disallowance of claims against the estate

Stern v Marshall
131 S. Ct. 2594 (2011)

- Counterclaims by the estate against persons filing claims against the estate
- Orders in respect to obtaining credit
- Orders to turn over property to the estate

b. Non-core proceedings, or proceedings that are related to the bankruptcy case, are subject to permissive or mandatory abstention, *see* paras. 3) and 4) below. *But see also* para. 5) below

3) Permissive abstention

28 USC § 1334(c)(1)

In the interest of justice or comity, the Bankruptcy Ct may abstain from hearing a matter arising under or relating to the title 11 case (e.g., issues of state property law)

28 USC § 1334(c)(2)

4) Mandatory abstention

a. The Bankruptcy Ct must abstain upon a timely motion

- When a proceeding is based upon a state law claim or cause of action, and
- The proceeding is related to, but not arising under, the main case, and

- The proceeding could not have been brought in federal Ct absent 28 USC § 1334, and

- The proceeding is commenced and can be timely adjudicated in State Ct (i.e., a complaint was filed before the title 11 case began)

Stern v Marshall
131 S. Ct. 2594 (2011)

- Bankruptcy Ct cannot enter final judgment in litigation before Bankruptcy Ct on counterclaim that did not arise under Bankruptcy Code

5) Personal-injury tort and wrongful death cases

28 USC § 157(b)(5)

These cases are excepted from mandatory abstention; *see* para. 4) above. These cases are tried in either the Bankruptcy Ct or the Ct in which the case was filed, at the option of the bankruptcy judge

C. Removal to Bankruptcy Ct

28 USC § 1452(a)

1) A party may remove any claim or cause of action in a civil action to the Bankruptcy Ct if the Bankruptcy Ct has jurisdiction over the claim under 28 USC § 1334

a. Removal of a State Ct action to a Bankruptcy Ct differs from ordinary removal (under 28 USC § 1441) in several ways:

- Any party (not just Defs) may seek removal under 28 USC § 1452(a), including the plaintiff or the bankruptcy trustee

- Any "claim or cause of action" may be removed to the Bankruptcy Ct under 28 USC § 1452(a), rather than the entire suit

- Ordinary removal is timely only within 30 days after service of process; removal under 28 USC § 1452 does not have a time limit

2) Non-civil actions, Tax Ct proceedings, certain civil actions by governmental units, and claims over which the Bankruptcy Ct would lack jurisdiction (e.g., because they are too tangential to the case) are not removable under 28 USC § 1452(a)

28 USC § 1334(e)

D. The estate

1) Bankruptcy Ct has exclusive jurisdiction over all property, wherever located, of the estate and the debtor

a. Bankruptcy Ct has exclusive jurisdiction over property acquired after the commencement of the case when such property is part of the estate

b. "Property" includes claims and causes of action held by the debtor at the commencement of the case, e.g., a right to payment on an account receivable

3. Property of the Bankruptcy Estate

11 USC § 541

A. Property included in estate is extensive

Oliver v
Heritage Mut Ins Co
179 Wis. 2d 1
(Ct. App. 1993)

1) All legal and equitable interest of debtor in property at inception of case

2) Most community (marital) property of both spouses is in estate even if only one spouse files

3) Property recovered by the trustee under avoiding powers, including

a. Property fraudulently transferred

b. Payments or liens that constitute preferences, subject to certain creditors' defenses

11 USC §§ 544–551

c. Property resulting from avoided improperly perfected liens

11 USC § 543

4) Trustee may recover property that is in hands of a receiver, subject to certain limitations and protections for receiver and those to whom the receiver has become obligated

5) Estate includes property debtor acquires by bequest, devise, inheritance, property settlement with spouse, or benefits of life insurance policies within 180 days after petition is filed

6) In proceeding under 11 USC Ch 7, estate also includes proceeds, products, offspring, and rents of or from property of estate after case begins, but does not include earnings from services performed by debtor

7) In cases under 11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13, property of the estate includes property acquired after commencement of case, including earnings from services performed by debtor

B. Individual debtors may exempt property for a fresh start

11 USC § 522(d)(5);
see 87 FR 6625
(2/4/2022) (adjusting
dollar amounts);
see also 11 USC § 522(m);
In re Czerneski

330 B.R. 240
(Bankr. E.D. Wis. 2005)

1) Consumer debtors may choose to claim either federal or state exemptions. If applicable state law, like Wisconsin's, provides debtors with the option to choose the federal exemptions, debtors may exempt interests up to a fixed dollar amount in a vehicle, real property, household goods, and professional books or tools, for example, plus a "wild card" exemption applicable to any property up to $1,475 plus up to $13,950 of any unused amount of the homestead exemption, for a total of $15,425 in value. Married debtors may "stack" all exemptions

§ 815.20
North Side Bank
v Gentile
129 Wis. 2d 208 (1986)

2) Debtors in Wisconsin may opt to forgo the federal exemptions and instead choose exemptions provided in Wis Stat Ch 815, including up to $75,000 of equity in one homestead. Married debtors may stack all exemptions, including the homestead exemption, for a total exemption for a married couple of $150,000

11 USC § 522(b)(3)

3) Debtors moving to Wisconsin within 730 days before filing their petition must choose the exemptions from the State in which they lived for more than one-half of the 180 days before the 730-day period. Under certain situations, they might have to use the federal exemptions

4) Husband and wife must jointly choose state or federal exemptions

Schwab v Reilly
130 S. Ct. 2652 (2010)

5) Even an estate in a proceeding under 11 USC Ch 7 may include appreciable value of an asset if it cannot be exempted

C. Secured creditors are protected by their liens

Dewsnup v Timm
112 S. Ct. 773 (1992)

1) A properly perfected lien or security interest in an asset survives bankruptcy, except under specific circumstances

11 USC § 521

2) Bankruptcy Code requires debtors in consumer cases to state their intentions with regard to secured property soon after case is filed

a. Debtors must reaffirm with secured creditor in written document filed with Ct, redeem the property, or surrender secured property within 30 days after the meeting of creditors

b. Debtors may redeem personal property by paying value of collateral to creditor; in limited circumstances, the debtor may redeem only by paying the full amount of the debt

c. Collateral may be surrendered

d. Under certain circumstances, lien of creditor on personal property may be avoided and debtor allowed to keep the collateral

e. When debtors "reaffirm," it is as if the specific debt survives the bankruptcy such that the debtors remain personally liable for payment. *See infra* **Sec. 7.Z.**

3) In proceedings under 11 USC Ch 11 and 11 USC Ch 13, some secured claims can be "crammed down" to the value of the creditor's collateral, with certain limitations, but a mortgage on the debtor's residence cannot be crammed down unless the debt secured by the mortgage is secured by property in addition to the mortgage (most commonly a personal guarantee of business debt secured by a general business security agreement and a mortgage on debtor's residence)

11 USC § 506

4) In a Ch 13 case, debtor may strip a junior lien, even on debtor's primary residence, if zero equity exists to which lien may attach and (in some Cts) if debtor is eligible for a Ch 13 discharge

11 USC § 1190(3)

5) In a Subch V Ch 11 case, individual debtor may reduce the amount of a lien on property, including residence, to the value of the property, but only if proceeds from loan secured by lien were used for business purposes

6) After debtor receives discharge of judgment debt in bankruptcy, State Ct must enter Satisfaction of Judgment Due to Discharge in Bankruptcy upon application from debtors, pursuant to § 806.19(4)

4. Role of the Trustee

11 USC § 544

A. Trustee has many of the same powers given to a receiver under Wis Stat Ch 128, plus more. Trustee has powers of a hypothetical lien creditor or bona fide purchaser with strong-arm powers that are to be used to marshal assets for creditors' benefit

FRBP 7001

B. Trustee is entitled to move Bankruptcy Ct or begin an "adversary proceeding"—akin to a trial within the bankruptcy case—to exercise strong-arm powers to

11 USC § 542
11 USC § 543

1) Obtain turnover of property to estate

11 USC § 545
11 USC § 548

2) Avoid liens and fraudulent transfers

11 USC § 547

3) Recover preferences

11 USC § 363

4) Use, sell, or lease property, including assets owned by debtor and a co-owner under certain circumstances

11 USC § 554

C. Abandonment of estate property by trustee

1) Trustee may abandon (give up) any property of estate that is burdensome (i.e., litigation might eat up any value that exists) or of inconsequential value to estate (i.e., no equity for unsecured creditors)

2) Interested parties, including trustee and debtor, may move Bankruptcy Ct to direct trustee to abandon property

3) Abandonment and relief from stay are distinct

a. Relief from stay might be granted with abandonment denied

b. Example: Property is not abandoned, so trustee might continue to market a property in foreclosure in the hope that sale might pay off debt and produce a surplus for the benefit of creditors. At the same time, relief from stay could be granted for secured creditor to foreclose

11 USC § 365

D. Trustee may deal with executory contracts and unexpired leases of debtor if value for estate exists

1) Trustee may assume or reject within specified time periods

2) Example: There could be a commercial lease that is below market rate that trustee wants to assume and then sell because someone would pay the estate for the inexpensive lease payments for the balance of the term of the lease

3) If debtor is in default, trustee must cure before assignment allowed

4) Bankruptcy clauses providing for automatic default upon bankruptcy are unenforceable by creditor

E. Role of the Trustee in Ch 13 and Subch V of Ch 11 varies

11 USC §§ 1107–1108
11 USC § 1183
11 USC § 1302

1) In a case under 11 USC Ch 11, a debtor in possession has most of the rights and responsibilities of a trustee

2) In a case under Ch 11, Subch V, the Subch V trustee is charged with monitoring and oversight functions, the right to be heard on specific matters, and to "facilitate the development of a consensual plan of reorganization." The *Handbook for Small Business Chapter 11 Subchapter V Trustees*, https://www.justice.gov/ust/file/subchapterv_trustee_handbook.pdf/dl, reiterates that plan facilitation is one of the Subch V trustee's principal duties

3) Ch 13 trustee's basic role is to review plans, advise the court with respect to plans, and act as a disbursing agent under confirmed plans

11 USC § 362

5. The Automatic Stay

A. Effect of stay

1) Stay is automatic upon the filing of any bankruptcy petition

2) Stay is one of chief motivations for seeking bankruptcy relief

   a. Stops replevin, foreclosure, and garnishment actions being taken against a debtor

   b. Stops all actions against property of the estate (for example, sheriff's sales with waiver of deficiency judgment)

3) Stay acts to immediately prohibit creditors from

Vretenar v Hebron
144 Wis. 2d 655 (1988)

   a. Commencing or continuing judicial or other proceedings against debtor with respect to claims that arose before commencement of bankruptcy case

   b. Enforcing pre-petition judgments against debtor or property of estate

   c. Taking action to obtain possession of property of estate

   d. Taking action to enforce a claim against debtor, even if action is to recover property not belonging to debtor (i.e., foreclosure of property securing debt if property does not belong to debtor)

Citizens Bank of Md
v Strumpf
116 S. Ct. 286 (1995)

   e. Asserting set-off, with one exception: an administrative hold on bank accounts is allowed if followed by motion for relief from stay

   f. Taking action to create, perfect, or enforce lien except as provided

Schonscheck v
Deere & Co
(In re Schonscheck)
592 B.R. 679
(Bankr. E.D. Wis. 2018)

4) Stay is effective against creditors even without notice, and acts done in violation of stay are void unless later affirmed by Bankruptcy Ct

   Note: Most Attys will provide bankruptcy case number, date and time of filing, and district in which petition was filed when asserting that a stay has stopped action of a creditor. Ct may want to ask for fax of petition to be sent or may confirm filing by calling clerk of Bankruptcy Ct

11 USC § 1201
11 USC § 1301

5) Stay is automatically applied to individuals who share liability on consumer debts with the debtor in proceedings under 11 USC Ch 12 and 11 USC Ch 13 (the "co-debtor stay"), but must be lifted under certain circumstances

6) Violation of stay may subject creditor to contempt proceedings and may require payment of debtor's Atty fees and other sanctions

7) Stay is designed to protect all property of debtor, including any interest in marital property

8) Bankruptcy Ct may modify the stay to allow a receiver or custodian to remain in possession of property of the estate

B. Items not affected by stay

11 USC § 362(b)

1) Commencement or continuation of criminal action or proceeding against debtor, as long as process is not being used to collect a debt

2) Commencement or continuation of action for establishment of paternity; establishment or modification of order for domestic support obligation; any action concerning child custody or visitation; dissolution of marriage, except to extent that it divides property belonging to bankruptcy estate; any action regarding domestic violence; collection of domestic support obligation from property that is not property of the estate; reporting of overdue support to a consumer reporting agency; interception of tax refunds for overdue support

3) Withholding of income that is property of the estate or property of the debtor established under a judicial or administrative order or statute; withholding, suspension, or restriction of a driver's license, professional license, or recreational license under state law, as provided under the Social Security Act (*see* 42 USC § 666(a)(16)); and enforcement of a medical obligation as provided by the Social Security Act

4) Any action to perfect or to maintain or continue perfection of an interest in property within certain time limits

5) Commencement of continuation of action or proceeding by governmental unit to enforce police or regulatory powers

6) Enforcement, other than a money judgment, to enforce police or regulatory powers

7) Actions against a co-debtor, except in proceedings under 11 USC Ch 12 and 11 USC Ch 13

8) Other provisions as found in 11 USC § 362(b)

11 USC § 362(c)(3)

9) Stay is also much more limited for serial bankruptcy filers—it may terminate 30 days after filing unless cause for an extension is shown

10) Stay is also more limited for debtors asserting it against a landlord who has already begun an action for eviction

C. Duration of stay

11 USC § 362

1) Stay terminates against property when sold or abandoned

First Nat'l Bank v Slater
120 Wis. 2d 441
(Ct. App. 1984)

2) Stay terminates with respect to other acts when case is closed or dismissed, or when discharge granted or denied

3) Stay terminates in "single asset real estate" cases after 90 days unless reasonable plan filed or debtor commences payments to secured creditor

4) Confirmed plan under 11 USC Ch 11 will include an injunction against collecting pre-petition claims

D. Relief from stay/adequate protection

11 USC § 362(d)

1) Creditor may obtain relief from Bankruptcy Ct terminating, modifying, or conditioning stay, which generally allows creditor to continue or initiate actions against the property in which creditor has unavoidable security interest. Relief from stay does not allow creditors to receive a money judgment against debtors. Relief from stay allows creditors to enforce their lien rights

2) Bankruptcy Ct shall grant relief from stay

Disrud v Arnold
167 Wis. 2d 177
(Ct. App. 1992)

a. For cause, including lack of adequate protection of creditor's interest in collateral, or

b. If debtor has no equity in collateral and it is not necessary for an effective reorganization

Note: "Adequate protection" is not defined, but may include monthly payments to the creditor, money in escrow, proof of insurance, or merely the existence of an equity cushion. The general goal of adequate protection is to protect the secured creditors' interest in collateral so secured creditors are not in a worse position vis-à-vis their security interest because of the bankruptcy filing

3) Relief may be granted after notice and opportunity for hearing

a. Creditor files motion in Bankruptcy Ct; gives notice of filing to interested parties

FRBP 4001, 9014

b. Notice specifies that unless hearing requested within 14 days, relief will be granted

c. If no hearing requested, creditor obtains order for relief from Bankruptcy Ct and can proceed in State Ct

d. If hearing requested, creditor has burden of proving whether debtor has any equity; debtor has burden of providing adequate protection of creditor's interest

e. Bankruptcy Ct must react to motion within time limits; any time can be shortened in emergency

f. Relief may be granted to complete pending State Ct case, i.e., one that could result in a nondischargeable debt, and findings are binding on Bankruptcy Ct if issue preclusion or claim preclusion rules apply

g. Debtor may consent to relief from stay, e.g., to allow continuing wage assignment for child support under 11 USC Ch 13 or to allow continuing foreclosure if there is no hope to keep property

4) Relief from stay and request for abandonment often go hand in hand

6. Discharge/Dischargeability of Debt

11 USC § 524
11 USC § 727

A. Discharge—Relief from debts

1) Individual debtors are granted discharge from debts unless denied by Bankruptcy Ct for certain types of debt; State Ct and Bankruptcy Ct have concurrent jurisdiction to determine dischargeability of some debts

2) Discharge in proceeding under 11 USC Ch 7 is typically about four months after filing

11 USC § 1141
11 USC § 1228
11 USC § 1328

3) Discharge in proceedings under 11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13 is at the successful completion of the plan

a. Trustee or creditor may object to discharge

b. Grounds for denial include acts by debtor that generally affect all creditors adversely (e.g., concealment of property, failure to keep records, fraud on creditors, false oath)

c. Procedure for objection to discharge is as in civil litigation: there is a summons and complaint, an answer is required, discovery may be needed, and a trial is held. Strict deadlines for filing litigation stated in bankruptcy notice

11 USC § 524
Gonzales v Am Cmty Credit Union
150 Wis. 2d 773
(Ct. App. 1989)

d. Injunction exists to protect discharged debtor from further harassment from creditors on pre-petition claims. A violation of the discharge order is sanctionable by the Bankruptcy Ct

11 USC § 1141(d)(5)

e. Individual debtors under 11 USC Ch 11 may receive discharge before plan completion "for cause"

11 USC § 727

4) Only individuals are entitled to a discharge under 11 USC Ch 7. A corporation does not receive a discharge under 11 USC Ch 7, but may receive a discharge in 11 USC Ch 11 proceeding under a confirmed plan

5) On joint debts, creditor may object to discharge in debtor's bankruptcy for certain acts of debtor

a. Discharge can be denied entirely for abusive conduct, e.g., making a false oath or concealing property

b. Discharge can be denied as to certain debts only, e.g., debts procured by fraud (including theft by contractor in certain circumstances)

6) Discharge of one spouse affects ability of creditors to recover from other spouse

11 USC § 523

B. Objection to dischargeability of debt

1) Individual creditor may file objection to discharge of specific debt in 11 USC Ch 7, 11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13

2) If timely objection not made to the discharge of certain debts, the obligations are discharged

a. Debts resulting from fraud and false representations (including theft by contractor in certain situations), fraud by a fiduciary or embezzlement or larceny, and debt caused by a willful and malicious injury may be excepted from discharge *only* if a timely objection is made.

Stoughton Lumber Co v Sveum
787 F3d 1174
(7th Cir. 2015)

- Consciously disregarding substantial and unjustifiable risk that conduct violates fiduciary duty can rise to the level of nondischargeable fraud

3) Determination made in adversary proceeding before bankruptcy judge if debt is for fraud or other intentional torts or property division. Other types of debts (some taxes, money borrowed to pay some nondischargeable debts, liability arising from drunk driving, most student loans, domestic support obligations) are automatically nondischargeable, and collection actions can proceed once automatic stay is not in effect

4) Creditor of nondebtor spouse may object to dischargeability of debt under certain circumstances because of wrongful acts of nondebtor spouse

5) Generally, domestic support obligations, or obligations that take the place of those obligations and function as support, are not dischargeable. Bankruptcy Ct and Family Ct have concurrent jurisdiction to make this

determination using federal standards

6) Provision in agreement or judgment that debt is nondischargeable in later bankruptcy is ineffective

Goulet v
Educ Credit Mgmt Corp
284 F3d 773
(7th Cir 2002)

7) All student loans (not just government-guaranteed student loans) are nondischargeable unless the debtor can prove an "undue hardship," i.e., a "certainty of hopelessness"

7. Bankruptcy Terms

11 USC § 554

A. Abandonment. A disclaimer of any interest by the trustee or debtor in burdensome or inconsequential property. Once property has been "abandoned," it is no longer property of the estate, and parties with a security interest in the property may proceed against it

28 USC § 1334

B. Abstention. A Bankruptcy Ct may abstain from hearing a particular civil proceeding on the finding that it is in the interest of justice or in the interest of comity with State Cts or state law. A Bankruptcy Ct must abstain from a hearing involving a non-core proceeding based on a cause created by state law, when the cause is actually pending and can be timely adjudicated in a forum of appropriate jurisdiction. The Bankruptcy Ct may abstain from hearing an entire bankruptcy case on the finding that the interest of both creditors and the debtor will be served by dismissal of the petition

11 USC § 362

C. Automatic Stay. The filing of a voluntary, joint, or involuntary petition under any chapter of the Bankruptcy Code automatically operates as a stay against the commencement or continuation of most judicial, administrative, or other proceedings against the debtor or the debtor's estate. The purposes of the stay are to give the debtor under 11 USC Ch 11, 11 USC Ch 12, or 11 USC Ch 13 "breathing time" for rehabilitation; to give the Chapter 7 trustee the protection necessary for administering the assets of the estate; to relieve the Chapter 7 debtor from the pressure of creditor collection efforts. The law provides a number of exceptions to this general rule. A party seeking relief from the automatic stay must file a motion to lift the stay

11 USC § 545
11 USC § 548

D. Avoidance Power. The Bankruptcy Code grants the trustee the power to avoid certain transactions or transfers occurring before the commencement of the case, including preferences and fraudulent conveyances

E. Chapters of the Bankruptcy Code

11 USC Ch 7

1) **Chapter 7**. Chapter of the Code addressing liquidation and available to both individual and business debtors. Its purpose is to achieve a fair distribution to creditors of whatever nonexempt property the debtor has and to give the individual debtor a fresh start through the discharge in bankruptcy

11 USC Ch 11

2) **Chapter 11**. Chapter of the Code addressing reorganization and available for both individual and business debtors. The purpose of Chapter 11 is to rehabilitate a business as a going concern or reorganize an individual's finances.

The Chapter 11 debtor is given a fresh start through the binding effect on all concerned of the order of confirmation of a reorganization plan. Additional provisions in Subchapter V of Chapter 11 for small businesses

11 USC Ch 12

3) **Chapter 12**. Chapter of the Code designed to give special relief to a family farmer or family fisherman with regular income

11 USC Ch 13

4) **Chapter 13**. Chapter of the Code used as a rehabilitation vehicle for an individual with regular income whose debts do not exceed specified amounts, typically used to budget some of the debtor's future earnings under a plan through which creditors are paid in whole or in part

11 USC § 101(5)

F. Claim. Any right to payment, as well as any right to an equitable remedy for breach of performance if that breach also gives right to payment

G. Confirmation. The process by which the bankruptcy judge approves a plan of reorganization of a debtor

28 USC § 157

H. Core Proceedings. Proceedings arising under Title 11 or arising in a case under Title 11 in which the bankruptcy judge may conduct the entire proceeding and may enter the final and dispositive order or judgment

See 11 USC § 1129(b);
11 USC § 1325

I. Cramdown. One of two methods by which a debtor can confirm its Chapter 11 plan. Creditors may consent to the debtor's plan, or the debtor may "cram down" a plan over the objections of creditors when at least one class of impaired claims or interests have voted in the requisite number and amount to accept the plan, and certain other requirements are met with respect to all non-consenting impaired classes or claims or interests. In a proceeding under 11 USC Ch 13, cramdown may be used to reduce a creditor's secured claim to the value of its collateral, but does not apply when collateral is only a lien on the debtor's residence or certain vehicles purchased within 910 days before the bankruptcy filing

11 USC § 1102

J. Creditors' Committee. A group of unsecured creditors appointed by the U.S. Trustee to represent the interests of all unsecured creditors before the Ct. The committee may retain counsel and other professionals at the expense of the estate to be heard in a wide range of matters

K. Debtor. The individual or entity that seeks voluntary relief under the Bankruptcy Code, or has been forced involuntarily into a bankruptcy case under 11 USC Ch 7 or 11 USC Ch 11 by petitioning creditors

11 USC § 1107
11 USC § 1108
11 USC § 1203

L. Debtor in Possession. A debtor, under 11 USC Ch 11 or 11 USC Ch 12, that operates its own business, and remains in possession of its assets and property. For cause, the bankruptcy judge may order that the debtor in possession be replaced by a trustee appointed by the U.S. Trustee

See 11 USC § 524
11 USC § 727
11 USC § 1141
11 USC § 1228
11 USC § 1328

M. Discharge. An order that relieves the debtor's *in personam* liability on claims within its scope, and acts as a permanent injunction against judicial proceedings or nonjudicial collection efforts with respect to such claims

11 USC § 541

N. Estate. Created by the filing of a voluntary, joint, or involuntary petition and consisting of all the debtor's legal and equitable interest in property as of the commencement of the case. An individual debtor is able to exempt certain property from the estate. Property of the estate also does not include (1) any power that a debtor can exercise for someone else's benefit; and (2) traditional spendthrift trust interests required by state law. The Estate is administered by a debtor, a debtor in possession, or a trustee

11 USC § 1104
11 USC § 1106

O. Examiner. An individual who may be appointed by the Bankruptcy Ct with duties limited to conducting an investigation of specified acts and business affairs of the debtor in possession. The appointment of an Examiner does not change the status of a debtor as a debtor in possession who remains in control of the property of the estate during the bankruptcy case under 11 USC Ch 11

11 USC § 365

P. Executory Contract. A contract under which the obligations of both the debtor and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other. The Bankruptcy Code grants the trustee the ability to assume, assign, or reject executory contracts and unexpired leases for the benefit of the estate, subject to Bankruptcy Ct approval

11 USC § 522

Q. Exemptions. A debtor's claims that protect certain property by removing it from the bankruptcy estate. The debtor retains exempt property, or the cash equivalent if the property is sold, free from the claims of its unsecured creditors

11 USC § 548

R. Fraudulent Conveyance. A transfer that can be avoided by the trustee if the transfer was made with (1) actual fraud evidenced by an intent to defraud, hinder, or delay creditors; or (2) constructive fraud, evidenced by the debtor's receipt of less than reasonably equivalent value in exchange for the transfer

S. No Asset Case. A case without sufficient nonexempt, non–fully encumbered assets to potentially provide a distribution to unsecured creditors

11 USC § 502

T. Objection to Claim. The filing of an objection to a claim initiates a process that will ultimately result in the allowance or disallowance of that claim by the Bankruptcy Ct

U. Petition

11 USC § 303

1) **Involuntary Petition**. When creditors file a petition seeking to place the debtor under either 11 USC Ch 7 or 11 USC Ch 11. If the debtor contests and prevails, the Ct shall dismiss the Involuntary Petition. If the debtor does not contest, or contests and loses, the Bankruptcy Ct shall enter an order for relief

11 USC § 301

2) **Voluntary Petition**. When a debtor voluntarily seeks relief under one of the chapters of the Bankruptcy Code. The filing of the petition operates automatically to invoke the stay

11 USC §§ 1121–1129
11 USC §§ 1221–1225
11 USC §§ 1321–1325

V. Plan of Reorganization. The document the debtor submits for confirmation to restructure and perhaps forgive certain pre-petition debt. The debtor proposes plans in 11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13

11 USC § 547

W. Preference. A transfer of the debtor's property to or for the benefit of a creditor, for or on account of an antecedent debt, made while the debtor was insolvent, within 90 days before bankruptcy (or within one year before the petition was filed in an "insider" situation), and the effect of which was to give the creditor more than the creditor would have otherwise received in a distribution under 11 USC Ch 7. The trustee's power to avoid preferences is designed to achieve the policy of fostering equality of distribution among the creditors of an insolvent debtor

11 USC § 507(a);
see 87 FR 6625
(2/4/2022) (adjusting
dollar amounts)

X. Priority Claim. Unsecured claims entitled to priority and distribution over other unsecured claims, including unsecured claims for domestic support obligations; administrative expenses; claims arising in the ordinary course of the debtor's business after the filing of an involuntary petition and before the entry of the order for relief; certain wage, salary, or commission claims; certain contributions to employee benefit plans; certain claims of farmers and fishermen; certain consumer claims of up to $3,350; and certain unsecured tax claims

11 USC § 501
11 USC § 502

Y. Proof of Claim. Document a creditor files, together with all supporting evidence of such claim, including documentation reflecting perfection of a security interest, if any. There is usually a deadline in which to file a Proof of Claim. In cases under 11 USC Ch 12 and 11 USC Ch 13, creditors should file claims by the deadline (stated in the Notice from the clerk) and as early as possible. In cases under 11 USC Ch 7 and 11 USC Ch 11, the debtor or trustee will send a separate Claims Bar Date Notice. The claim filing deadline is almost absolute

11 USC § 524(c)

Z. Reaffirmation—When debtor agrees to enter into an agreement with a creditor whereby a particular debt survives the bankruptcy case and is excluded from debtor's discharge. Most often seen with small business debts and some vehicles, when debtor reaffirms (and the parties follow the process in the bankruptcy Ct for making the reaffirmation agreement enforceable). The creditor retains the right to pursue the debtor personally upon default rather than just enforce its lien rights

11 USC § 722

AA. Redemption. When an individual debtor reclaims property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if the property is exempt, or has been abandoned, by paying the lienholder the amount of the allowed secured claim of the lienholder that is secured by such lien. Redemption must be a cash transaction, unless the creditor consents to pay out over time

28 USC § 1452

BB. Removal. Process by which either Def or plaintiff may transfer a civil action in a non-bankruptcy forum involving the debtor and the District Ct (and by the standing order of reference to the Bankruptcy Ct)

8. Questions Commonly Asked by State Court Judges

What follows are questions that are commonly asked of bankruptcy practitioners by State Ct Trial Judges and cursory responses meant for quick reference. Most of the topics addressed are covered in greater detail in these materials.

A. What sort of actions, motions, and proceedings in State Ct are not stayed by the filing of a bankruptcy?

ANSWER: Certain actions are excluded by statute from the operation of the automatic stay, and the following are common ones:

1) Most criminal proceedings; domestic support obligation collections; police or regulatory enforcement actions (i.e. consumer protection and environmental actions); certain set-offs, etc.

2) Statutory exceptions from application of the stay appear at 11 U.S.C. § 362(b)

B. Can a State Ct Judge act in violation of the bankruptcy stay?

ANSWER: Yes. While it is more likely that a party or counsel for a party would be acting contrary to the automatic stay, a State Ct Judge could violate it in myriad ways, ranging from a pretrial conference in a mortgage foreclosure action to a trial of a contract dispute. Essentially any act that inches a matter forward on a claim against a debtor or property of the estate during the pendency of a bankruptcy violates the stay. As a practical matter, only acts in willful violation of the stay result in contempt proceedings, from which State Ct Judges would likely be immune. Actions against co-defendants are not stayed if the action does not involve a claim against the debtor or property of the estate, but Ct can still request a modification of the automatic stay from the Bankruptcy Ct for clarity. Actions taken to advance a claim held by a debtor are not stayed.

C. In a lawsuit before me, three Defs are alleged to be joint tortfeasors. State law provides for percentage apportionment of liability. One of the three Defs files bankruptcy.

(1) Can the case proceed?

(2) Should it?

ANSWER: (1) Maybe. The case against three joint tortfeasors could proceed against two of them after the third files bankruptcy in a State that apportions liability by percentage. The Bankruptcy Cts will decide whether the automatic stay applies because the ultimate determination could conclusively establish liability of the debtor.

(2) No. The case should not proceed until the plaintiff or a co-Def obtains relief from the automatic stay.

D. A Def in a tort suit files bankruptcy. All parties acknowledge that Defs are covered by insurance, and that the liability of the Def will be limited by the extent of this coverage. Do I need a Bankruptcy Ct order to proceed with this case?

ANSWER: Yes. Even in tort cases in which a Def is insured and liability is limited to the extent of coverage, a party in the proceeding should seek an order granting relief from the automatic stay to remove any doubt about the effects of proceeding with the action.

E. (1) Can Bankruptcy Ct reexamine or undo my awards of child support, alimony, or Atty fees in a divorce action?

(2) To what extent?

ANSWER: (1) Yes. The Bankruptcy Ct can reexamine awards of child support, alimony or Atty fees made in a divorce action because "domestic support obligations" are nondischargeable, but "property settlements" may be discharged in a case under 11 USC Ch 13. Since support and maintenance awards are generally nondischargeable, as domestic support obligations, questions arise about the characterizations of those awards (as well as Atty fee awards).

(2) Bankruptcy Cts undo such State Ct awards if their characterizations are inconsistent with the parties' true intentions and dischargeability rights of the debtor in a proceeding under 11 USC Ch 13. In other words, Bankruptcy Cts will examine whether divorce judgment provisions are domestic support obligations—amounts owed "in the nature of maintenance or support."

F. (1) Once a party to a case before me has filed bankruptcy, can the Bankruptcy Ct remove the entire case or part of the case to its jurisdiction for determination?

(2) Can that same Ct remand the cases back to me for determination?

Stern v Marshall
131 S. Ct. 2594 (2011)

ANSWER: (1) Yes, however, it will not likely remove or retain cases such as personal-injury actions that are traditionally determined in State Ct, especially after the *Stern v Marshall* decision from the U.S. Supreme Court in 2011. Bankruptcy Cts cannot issue any final orders in cases unless the cases are core proceedings.

(2) Yes.

G. (1) Other than judgments for alimony and child support, what specific State Ct judgments are truly nondischargeable under the different Bankruptcy Code chapters?

(2) Can such nondischargeable judgments be collaterally attacked in the Bankruptcy Ct?

ANSWER: (1) Examples of State Ct judgments other than for alimony or support that are not dischargeable in cases under 11 USC Ch 7 include:

(a) Judgments imposing fines, penalties, or forfeitures; judgments imposed in awards for personal injury or death caused by drunk driving incidents; and, if challenged, the following judgments: those arising from breaches of fiduciary duties, embezzlement, or larceny, or from willful or malicious injuries to persons or property.

(b) The reorganization chapters (11 USC Ch 11, 11 USC Ch 12, and 11 USC Ch 13) provide some broader discharge opportunities than are available to debtors under 11 USC Ch 7.

(2) Yes, but collateral estoppel applies in bankruptcy proceedings to matters that have been fully litigated in State Cts. Default judgments or issues not fully litigated may be subject to collateral attack in the Bankruptcy Ct.

H. If a debtor files a petition under 11 USC Ch 13, even judgments for embezzlement, fraud, intentional torts, and drunk driving can be discharged. Is this true?

ANSWER: No longer. Chapter 13 debtors can obtain what is called a "super discharge" as to willful and malicious debts, property division debts, and some debts of limited applicability. This occurs because they pay the required amounts over an extended period of time through wage earner plans, and they are not entitled to a discharge until the successful completion of the plan.

I. (1) Are there any circumstances under which restitution or fines in a criminal case are dischargeable?

(2) If so, can I craft my orders to insure that such restitution and fines will not be dischargeable under any circumstances?

ANSWER: (1) Only if the criminal sanction was imposed as compensation for pecuniary loss rather than as punishment. Restitution is penal and compensatory so it is not dischargeable.

(2) Imposing orders that are clearly meant to punish, at least in part, would render the sanction nondischargeable.

J. The Def in a collection suit before me affirmatively alleges discharge in bankruptcy. Shall I resolve this issue, or is the dischargeability issue only within the jurisdiction of the Bankruptcy Ct?

ANSWER: Only Bankruptcy Cts can determine whether to grant or deny a discharge in bankruptcy, but State Ct Judges can ascertain whether discharge has in fact been granted or denied through evidentiary methods of proof of any fact.

K. A lawyer for a party calls and advises me that a client has filed bankruptcy. How do I verify this?

ANSWER: The Atty should give a case number and date of filing and district where filed. Call the Bankruptcy Ct clerk's office or access the docket electronically, through PACER services. Some Attys will file a Suggestion of Bankruptcy, a document intended to give State Cts notice of the filing.

L. When will a Bankruptcy Ct review my decisions?

DC Ct App v Feldman
103 S. Ct. 1303 (1983)
Rooker v Fid Tr Co
44 S. Ct. 149 (1923)

ANSWER: The *Rooker-Feldman* doctrine prevents the federal District Cts from entertaining actions brought by "state-court losers" challenging state-Ct judgments rendered before the District Ct proceedings commenced.

The *Rooker-Feldman* doctrine stops parties from seeking to vacate State Ct judgments based on error or mistake by a State Ct Judge. The proper procedure is not to relitigate in Bankruptcy Ct; rather, parties must follow the state appellate procedure.

The doctrine is commonly invoked to bar debtors from seeking to vacate foreclosure judgments entered in State Ct.

RECEIVERSHIPS

1. Receiverships Are Drastic Proceedings

A. Receiverships remove control from the individual or company and place it in the hands of a third party

Davelaar v Schneck
110 Wis. 470 (1901)

B. Affairs are administered under direction of Ct

C. Party's property is sequestered and referred to as the "receivership estate"

2. Receivers: In General

Candee v Egan
84 Wis. 2d 348, 358
(1978)

A. Officers of the Ct, wholly answerable to the Ct, extension of the Ct's powers

B. Must be qualified to serve, either as an Atty or another professional. Ch 128 receivers must be residents of Wis

Candee v Egan
84 Wis. 2d 348, 362
(1978)

C. Serve as fiduciaries to the receivership estate and all parties with an interest in the estate

§ 816.04

Exception: Selfish receivers act in the interest of the judgment creditor only

Tralmer Sales & Serv, Inc v Erickson
186 Wis. 2d 549, 572
(Ct. App. 1994)

D. Appointment is in the discretion of the Ct

3. Types of Receivers

A. Ch

128—Business

See Pendente lite, Black's Law Dictionary (11th ed 2019)

B. Ch

813—*Pendente lite* (while the action is pending)

C. Sec.

816.04—"Selfish"

D. Ch

128—Individual

4. Process

A. Voluntary Ch 128 cases can be filed by the debtor/"assignor" after an assignment to an intended receiver ("assignee")

B. Except in involuntary Ch 128 cases, begins with petition

Anchor Coatings, Inc v De Gelleke Co 71 Wis. 2d 333, 335 (1976) (emphasis added) (citations omitted)

C. Granted on an ex parte basis only in the most extreme circumstances and if "proper showing that notice might *frustrate the proceedings* by allowing the debtor to conceal or waste his assets. In such case the debtor may always subsequently challenge the appointment"

5. Chapter

128 Receiverships—Business

A. Goal: orderly recovery, liquidation, and distribution of debtor's nonexempt assets in accordance with priorities of the creditors

B. Guidance for Ch 128 cases

1) Chapter is only a few pages long, and little case law exists

2) Ch 128 is based on the federal Bankruptcy Act of 1898, as amended through 1928. Case law interpreting the Act (which predated the Bankruptcy Code) may be useful, if old

See, e.g., Gelatt v DeDakis (In re Mader's Store for Men, Inc) 77 Wis. 2d 578, 601–11 (1977) (applying subordination principles from bankruptcy law)

3) Attorneys often apply bankruptcy analysis to Ch 128 cases, but the usefulness of applying Bankruptcy Code analysis to Ch 128 receiverships is limited

4) Much of the practice is by custom and is pursuant to the specific language of orders entered by the Ct

C. Can be voluntary or involuntary

§ 128.02

1) Voluntary: basic steps

a. Corporate resolution or shareholder consent

b. Assignment for the benefit of creditors

c. Petition for appointment of receiver filed by intended receiver (indicates receiver's consent to the appointment)

d. Order appointing receiver

e. Receiver files bond with the Ct

2) Involuntary appointment

§ 128.08(1)(b)

a. When a corporation has been dissolved or is insolvent or is in imminent danger of insolvency or has forfeited its corporate rights, or

§ 128.08(1)(a)

b. When execution against a judgment debtor is returned unsatisfied in whole or in part

- Three tests for solvency:

§ 128.001(1)(a)

— Balance sheet test (assets are less than debts)

§ 128.001(1)(b)

— Judgment execution is returned unsatisfied

§ 128.001(1)(c)

— Assignment for the benefit of creditors is given

D. Language of the order appointing receiver is key. Orders can be very long and provide for the process of the case. Some receivers prefer separate case management order

§ 128.19

E. Title to all of debtor's nonexempt assets vests in receiver

F. Receiver often files a motion to allow the receiver to use the secured creditor's collateral—cash, accounts receivable, inventory—and even to borrow new money to pay for operations and to fund the case (including receiver's fees)

§ 128.14

G. Creditors are enjoined from collection

H. Receiver may, but is not required to, operate the business

I. Receiver has power to sell receivership assets

BNP Paribas v
Olsen's Mill, Inc
2011 WI 61, ¶ 52
335 Wis. 2d 427
Wis Brick & Block Corp
v Vogel
54 Wis. 2d 321, 326
(1972)

1) Consent of secured party required for sale of collateral if the purchase price is insufficient to pay that party's claim in full, and if the value of that collateral has not been established

2) Post-*Olsen's Mill*, sales orders in Ch 128 cases now generally provide for judicial determination of value with the receiver as liquidator pursuant to § 128.25(1)(c), (6)(c)

§ 128.13

J. Statute requires debtor to file an inventory of assets and list of creditors within 10 days after the receiver's appointment. Often does not happen because of the receiver's possession of books and records and because of the debtor's practical inability to comply

K. Avoidance actions

§ 128.16

1) Receiver has authority to investigate and discover existence of assets

§ 128.07
§ 128.18

2) Receiver may avoid preferential transfers made within 4 months before the receivership, including judgments, attachments, and levies

§ 128.07(1)(a), (2)

a. Elements of a preference action in a Ch 128 proceeding:

- Transfer

§ 128.07(1)(c)1.

Note: Transfer is defined broadly.

- Debtor was insolvent at time of transfer

§ 128.07(1)(a)

- Effect of transfer enables "creditor to obtain a greater percentage of his or her debt than any other creditor in the same class"

§ 128.07(2)

- Preference was given within 4 months before the filing of the petition

- Recipient had "reasonable cause" to believe that the transfer would effect a preference

Grant v First Nat'l Bank
97 US 80, 81 (1877)

"It is not enough that a creditor has some cause to suspect …; … he must have such a knowledge of facts as to induce a reasonable belief…. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting."

b. Defenses to a preference action: there are no statutory defenses to preference actions in a Ch 128 proceeding. However, the case law does recognize some defenses to preference actions

Ready Fixtures Co
v Stevens Cabinets
488 F. Supp. 2d 787,
789–91 (W.D. Wis. 2007)

Note: In *Ready Fixtures Co v Stevens Cabinets*, the creditor attempted to argue that § 128.07 was preempted by the federal bankruptcy preference statute. The creditor cited the Wis statute's longer preference period and its lack of defenses to the preference actions as two reasons why the Wis statute would be preempted by federal law. The Ct held that the Wis preference statute was not preempted by the federal bankruptcy preference statute.

3) Receiver may avoid voidable transactions under § 242.07 or fraudulent transfers under § 128.18

4) Preference and fraudulent transfer litigation are separate actions brought by the receiver as the plaintiff

§ 128.14
§ 128.15(1)(a), (b)

L. Statute provides for process of filing proofs of claim and objections to the claims

§ 128.17

M. Statute provides for orderly distributions

1) Liens in order of priority

2) Administrative costs, including receiver's fees

3) Certain wages

4) Certain taxes

5) Creditors who filed proofs of claim, pro rata

N. Bankruptcy may end receiverships

Int'l Shoe Co v Pinkus
49 S. Ct. 108 (1929)

1) Receivership does not prevent bankruptcy filing

11 USC § 543(a)

2) Bankruptcy stays the receiver. Once bankruptcy is filed, receiver must stop administering any property of the receivership estate, "except such action as is necessary to preserve such property"

11 USC § 543(d)(2)

3) If the receiver has been appointed for more than 120 days as of the bankruptcy filing, then the Bankruptcy Ct will not order turnover from the receiver to the bankruptcy estate without fraud or injustice

11 USC § 543(d)(1)

4) If the receiver has been appointed for less than 120 days, Bankruptcy Ct may excuse turnover from the receiver under certain, less stringent, circumstances

6. Wis. Stat.

Ch. 813—*Pendente Lite*

§ 813.16

A. Take possession of property to preserve and maintain it during the pending litigation. Generally, receiver does not sell assets

Zimmermann v
Walgreen Co
215 Wis. 491 (1934)

B. Fiduciary duty to all parties

C. Common in foreclosure cases

§ 813.16(1)

1) A receiver may be appointed when

a. The party seeking the receiver establishes an interest in property that is the subject of the action

b. That property is in the possession of the adverse party

c. The property or its rents and profits are in danger of being lost or materially impaired

Chetek St Bank v Barberg
170 Wis. 2d 516, 521
(Ct. App. 1992)

2) Waste (sufficient to result in appointment of receiver) includes failure to pay mortgage interest and taxes

Kremer v Rule
209 Wis. 183, 187–89
(1932)

3) It is not necessary to prove that the mortgaged premises were insufficient security for mortgage debt or that mortgagors were insolvent to establish waste. A Def cannot fend off the appointment of a receiver solely because there is an equity cushion in the property

§ 813.16(7)

4) A bank officer of certain federally supervised financial institutions can act as the receiver in a foreclosure action, without compensation and upon posting "such bond as the court requires"

Cf Cmty Nat'l Bank v Med Benefit Adm'rs, LLC
2001 WI App 98, ¶ 11
242 Wis. 2d 626

D. A receiver owes a fiduciary duty to the debtor and its unpaid creditors not to deal with receivership property to benefit receiver at debtor's expense

§ 813.16(4)

E. A receiver may be appointed "[w]hen a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights." *See also* § 180.1432(1) ("A court in a judicial proceeding brought to dissolve a corporation may appoint one or more receivers to wind up and liquidate the business and affairs of the corporation.")

7. Wis. Stat. § 816.04—"Selfish" Receiver

See Dawson v Goldammer
2006 WI App 158, ¶ 34
295 Wis. 2d 728

A. Receiver is a collection agent for a specific judgment creditor

See Dawson v Goldammer
2006 WI App 158, ¶¶ 34–36, 295 Wis. 2d 728

B. Does not owe a fiduciary duty to other creditors, but does owe a duty to the judgment debtor. *See also* § 813.16(2), (3) (stating that Ct may appoint a receiver by or after the judgment to carry the judgment into effect, in action by a judgment creditor under Ch 816)

Candee v Egan
84 Wis. 2d 348, 361
(1978)

C. "A receiver in aid of execution is authorized to collect those assets revealed by the examination of the debtor, take possession of them, apply them to the satisfaction of the judgment, and return the excess to the judgment debtor"

See US Rubber Prods v Twin Hwy Tire Co 233 Wis. 234, 241–42 (1939)

D. A Ch 816 receiver can sell the debtor's property

US Rubber Prods v Twin Hwy Tire Co 233 Wis. 234, 241–42 (1939)

E. Receiver may not operate the debtor's business as a going concern

F. Receiver's lien

1) Service on the judgment debtor of the order to appear at the supplemental examination gives rise to a receiver's lien

Mann v Bankr Est of Badger Lines, Inc (In re Badger Lines, Inc) 224 Wis. 2d 646, 661 (1999)

2) "[A] receiver's lien is superior against another creditor on a simple contract at the time the creditor serves the debtor with notice to appear at supplementary proceedings under [Ch] 816. Accordingly, Wisconsin law does not require a creditor to take additional steps to perfect a receiver's lien beyond service on the debtor"

Candee v Egan 84 Wis. 2d 348, 361 (1978)

3) Receiver may obtain a turnover lien on behalf of a judgment creditor, and may assist the judgment creditor in applying property to the satisfaction of judgment

8. Chapter

128 Receiverships—Individual

A. Similar to a Ch 13 wage earner plan

§ 128.21(1)

B. A person with wages or salary files a petition listing creditors who have levied execution, attachment, or garnishment

§ 128.12(2)

C. Filing stays collection actions for creditors named in petition

§ 128.21(3)(b)

D. Debtor proposes plan to pay creditors over three years

§ 128.21(3), (4)

E. Receiver is appointed to meet with debtor and creditors, report to the Ct whether a plan is feasible, and administer payments under the plan

CV 50: SERVICEMEMBERS CIVIL RELIEF ACT

1. Definition

A. Congressional legislation created to provide protection for those serving in the armed forces

2. Purpose

50 USC § 3902(1)

A. To provide for, strengthen, and expedite national defense through protection extended by Servicemembers Civil Relief Act (SCRA) to US servicemembers (SMs) to enable them to devote their entire energy to nation's defense needs; and

50 USC § 3902(2)

B. To provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during military service

3. Procedure

A. The following flow charts and checklist regarding the SCRA were prepared by Atty Mark E. Sullivan and reprinted with his permission. Additional information can be found at https://www.americanbar.org/groups/family_law/committees/military

ATCH 1 – SCRA Flow Chart (no appearance by servicemember (SM))

Has the SM entered an appearance?

YES → 50 U.S.C. § 3932 applies when SM has notice of the proceeding.

NO

Does the non-SM moving party wish to obtain a default judgment?*

NO → End of inquiry; no further action needed by court.**

YES

Has the movant filed an affidavit of military service, including "necessary facts to support the affidavit"?

NO → This is required by the SCRA.

YES

Does affidavit deny that the other party is in the military?

YES → Court may proceed if affidavit states that other party is NOT in the military, but may also investigate further (see below) and may punish a party who files a false affidavit.

NO

Does affidavit state that affiant does not know if the other party is in the military?

YES → Require affiant to ascertain status of other party through DMDC (Defense Manpower Data Center) and file new affidavit. The court may require the movant to file a bond in an amount approved by the court so that, if the other party is later found to be in military service, it is available to indemnify the absent party for any damages he or she suffers due to the default judgment, should the judgment be set aside in part or whole.

NO

Does affidavit state that the other party is in the military?

NO → STOP – you have contradicted yourself!

YES

Has the court appointed attorney for the SM?

NO → Appoint one; this is required by the SCRA.

YES

Can the appointed attorney locate the SM?

NO → Actions by the attorney shall not waive any defense the SM has or otherwise bind the SM. If after due diligence, counsel has been unable to contact the SM or otherwise determine if a meritorious defense exists, then the court shall grant a stay for at least 90 days on the request of the SM's attorney or on the court's own motion.

YES

Is there a defense for the SM and the defense cannot be presented without the presence of the SM?

NO → Court may proceed.

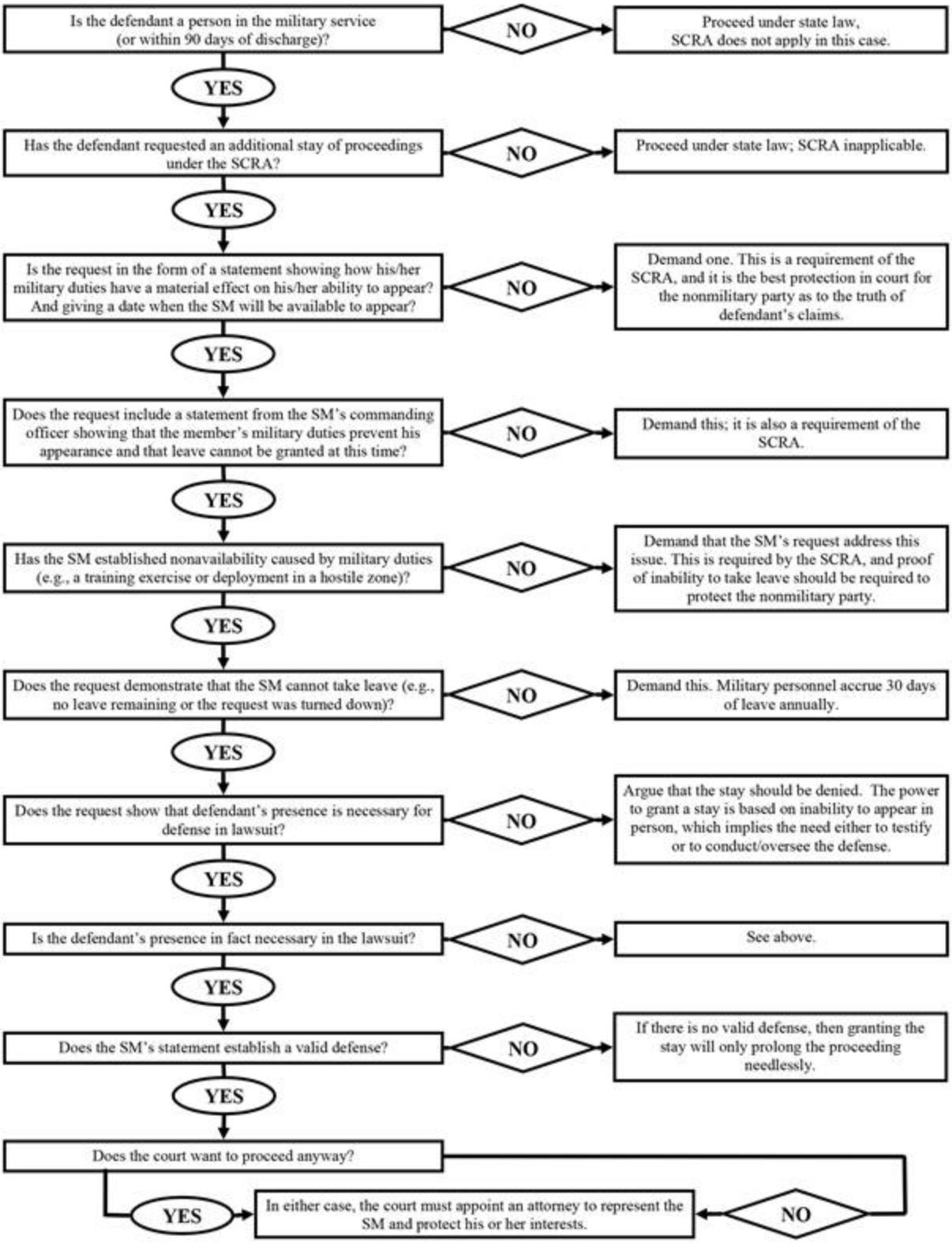
YES

The court shall grant a stay for at least 90 days on the request of the SM's attorney or on the court's own motion.

* The non-SM claimant may be either the plaintiff/petitioner or the defendant/respondent. A default judgment means any decree or order granting relief when the other side has not entered an appearance. Whether appearance means a specific appearance in the current proceeding before the court, or the lawsuit itself (irrespective of the stage of proceedings) depends on state law.

** "Court" also means administrative agency.

ATCH 2 – SCRA Flow Chart for "Additional Stay"



The Servicemembers Civil Relief Act: A Judge's Checklist

[NOTE: The SCRA can be found at 50 U.S.C. §§ 3901–4043.]

In using this checklist, keep in mind the purpose of the Act: to enable servicemembers (SMs) to devote their entire energy to the defense needs of the nation, and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of SMs during their military service. (50 U.S.C. § 3902)

☐ **Who is covered?** (50 U.S.C. § 3911) Those covered include:
- Members of the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard on active duty under 10 U.S.C. § 101(d)(1).
- National Guard members called to active duty by President or Secretary of Defense for more than 30 consecutive days under 32 U.S.C. § 502(f) (national emergency declared by the President and supported by federal funds).
- Commissioned members of the Public Health Service and the National Oceanographic and Atmospheric Administration.

☐ **Default situation**—When no appearance by SM (50 U.S.C. § 3931), you—
- 1. Must require affidavit of military status by moving party (who may check on whether missing party is in military service by requesting check of records by Dept. of Defense[1])
- 2. Must appoint an attorney before entry of judgment of the non-moving party is in military.
- 3. Must grant a stay of proceedings for at least 90 days when non-moving party is in military if—
    a. There may be a defense, and presence of SM is needed to make it, OR
    b. With due diligence, appointed attorney cannot contact client or otherwise determine whether meritorious defense exists.

☐ **Use of bond?** (50 U.S.C. § 3931(b)(3))
- As condition of entry of default judgment, require bond if you cannot determine whether defendant is in military service.
- Bond may be used to indemnify defendant against loss/damage from default judgment (if later set aside) should he/she later be found to be in the military.

☐ **Request for stay**—SM or attorney requests suspension of case (50 U.S.C. § 3932)
- Grant stay of proceedings (discretionary on court's own motion, mandatory on SM's motion) for at least 90 days if motion includes:
    1. Statement as to how the SM's current military duties materially affect his/her ability to appear,
    2. Statement of a date when the SM will be available to appear,
    3. Statement from the SM's commanding officer that SM's current military duty prevents his/her appearance, and
    4. Statement from the SM's commanding officer that military leave is not authorized for the SM at the time of the statement.

☐ **Grant additional stay (beyond initial 90 days)?**
- Yes if continuing material effect of military duty on SM's ability to appear. (50 U.S.C. § 3932(d)(1))
- Same information required as above. (*See* 50 U.S.C. § 3932(b)(2))

☐ **Deny additional stay?**
- Only if you appoint attorney to represent the SM in the action or proceeding. (50 U.S.C. § 3932(d)(2))
- Expect attorney to renew stay request since he/she cannot prepare, present case without assistance from the unavailable SM.

☐ **Unsure whether to grant or deny additional stay?**
- Ask for a copy of the SM's current LES (Leave and Earnings Statement), issued twice a month, to see how much leave SM has accrued, used in the past few months.
- Propound questions from the court to SM's commanding officer as to duty hours, days for the SM, his or her availability to attend court or to participate by telephone, Internet, or videoteleconference.

☐ **Execution of orders, judgments** (50 U.S.C. § 3934)
- Must stay execution of any judgment, order entered against SM if SM shows military duties materially affect his/her ability to comply with court decree.
- Also vacate or stay any attachment or garnishment of property, money, or debts in possession of the SM or third party.

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[1] Upon application by either side or the court, the military service must issue a statement as to military service. 50 U.S.C. § 4012. Contact: Defense Manpower Data Center, 1600 Wilson Blvd., Suite 400, Attn: Military Verification, Arlington, VA 22209-2593, [telephone 703-696-6762 or –5790/fax 703-696-4156]

☐ **Anticipatory relief** (50 U.S.C. § 4021)
- Grant relief from obligation or liability incurred by SM before his/her military service.
- Also for tax or assessment falling due before or during the SM's military service.

☐ **Reopen judgment** (50 U.S.C. § 3931(g))
- Must reopen order, judgment against SM if—
    1. SM was materially affected because of military service in asserting defense, and
    2. He/she has meritorious defense.

☐ **Are waivers allowed?** (50 U.S.C. § 3918)
- Only effective if made during or after period of military service.
- Usually must be in writing (and, in most cases, in 12-point font or larger).

☐ **Do not penalize SM in stay request.** (*See* 50 U.S.C. § 3932(c))
- Request for stay does not constitute appearance for jurisdictional purposes.
- Also does not constitute waiver of any defense, substantive or procedural.

☐ **Statute of limitation** (50 U.S.C. § 3936)
- Period of military service may not be included in computing any limitation period for filing suit, either by or against SM.

☐ **Protect against mortgage foreclosure** (50 U.S.C. § 3953)
- Court may stay foreclosure proceedings until SM can answer, extend mortgage maturity date to allow reduced monthly payments, grant foreclosure to being reopened if challenged by SM, or extend the period of redemption by period equal to the SM's military service.
- Conditions for above: if—
    1. Relief is sought on security interest in real/personal property
    2. Obligation originated before active duty
    3. Property owned by SM or dependent before active duty
    4. Property still owned by SM or dependent
    5. Ability to meet financial obligation is materially affected by SM's military service
    6. Action is filed during (or within one year after) SM's military service.

☐ **Protect SM-tenant** (50 U.S.C. §§ 3951–3952, 3955)
- Allow SM to terminate leases upon entry on active duty or receipt of military orders for deployment (not less than 90 days) or transfer to another base.
- Grant a stay of eviction upon application by SM-tenant who shows that ability to pay rent is materially affected by military service. (50 U.S.C. § 3951(b))
- If the rent is paid in advance, require landlord to refund unearned portion. The SM is required to pay rent only for those months before the lease is terminated. (50 U.S.C. § 3955(f))
- It is a misdemeanor for a landlord to knowingly seize, hold, or detain the security deposit or personal property of an SM or dependent when there is a lawful lease termination under the SCRA, or to knowingly interfere with the removal of such property because of a claim for rent after the termination date. A security deposit must be refunded to the SM upon termination of the lease. (50 U.S.C. § 3955(h))

* * *

CV 51: CLASS ACTIONS

1. Generally

Wal-Mart Stores, Inc
v Dukes
131 S. Ct. 2541, 2551
(2011)

A. Purpose of class action: judicial economy and financial economy for all parties

1) Enable issues central to multiple individual claims or defenses to be resolved "in one stroke"

2) Consolidation in single forum reduces burden on judicial resources

3) Filing separate claims and then seeking joinder is not practical

Sup Ct Order No 17-03
2017 WI 108
378 Wis. 2d xxi

B. Class-action rules rewritten and became effective July 1, 2018

§ 803.08—Judicial Council Cmte. Notes, 2017

C. Rules written to "track[] as closely as possible" FRCP 23 so that Wis Cts can seek guidance from "well-developed body of federal case law interpreting" FRCP 23

§ 803.08—Judicial Council Cmte. Notes, 2017

D. Sec.

803.08 varies from FRCP in only two material ways

§ 803.08(10)

1) Disposing of "residual funds" (unclaimed settlement funds)

§ 803.08(14)

2) Prohibition against class actions vs. State seeking tax refunds

2. Judicial Tasks Typical in Class Actions That Are Not Typical in Other Civil Proceedings

A. Certify class action

B. Appoint class representative and class counsel

C. Ensure notice to class members and potential class members

D. Approve settlement

E. Approve Atty fees

F. Disburse residual settlement funds

3. Class Certification

A. Procedure

§ 803.08(3)(a)

1) Determination whether to certify must be made "at an early practicable time"

2) Typically, plaintiff will move for class certification, but a Def may make motion

3) Before seeking certification, though not required, parties typically seek discovery, including discovery concerning merits of underlying claim

Steimel v Wernert
823 F3d 902, 917
(7th Cir. 2016)

4) Party seeking class certification bears burden of proof, by a preponderance of evidence, that proposed class meets prerequisites of rule (FRCP 23)

Messner v Northshore Univ HealthSystem
669 F3d 802, 811
(7th Cir. 2012)

5) If material issues of fact in dispute, Ct must conduct evidentiary hearing and issue findings of fact and conclusions of law

Wal-Mart Stores, Inc v Dukes
131 S. Ct. 2541, 2551
(2011)

a. Prerequisites stated in rule are not mere pleading standards

Messner v Northshore Univ HealthSystem
669 F3d 802, 811
(7th Cir. 2012)

b. Ct may not merely assume truth of matters asserted in pleadings

§ 803.08(11)(a)

6) If Ct determines that class should be certified, findings must be made in writing "setting forth all reasons why the action may be maintained and describing all evidence in support of the determination"

Comcast Corp v Behrend
133 S. Ct. 1426, 1432
(2013)
General Tel Co of SW v Falcon
102 S. Ct. 2364, 2372
(1982)

a. Ct must conduct "rigorous analysis" of whether prerequisites are met

Harwood v Wheaton Franciscan Servs, Inc
2019 WI App 53
388 Wis. 2d 546
Freeman v SL Greenfield, LLC
No 2021AP1262
2023 WL 4443657,
¶¶ 30–31
(Wis. Ct. App. 7/11/2023)
(unpublished opinion not citable per § 809.23(3))

b. Conclusory findings will not withstand scrutiny on appeal

Messner v Northshore Univ HealthSystem 669 F3d 802, 811 (7th Cir. 2012)
Hammetter v Verisma Sys 2021 WI App 53, ¶ 13 399 Wis. 2d 211

c. But Ct need not resolve issues in underlying dispute on their merits; speculation as to how case will fare on the merits at trial is not pertinent to whether to certify class

McDaniel v DOC No 2022AP1759 2024 WL 2168148 (Wis. Ct. App. 5/15/2024) (unpublished opinion not citable per § 809.23(3)) *pet for rev filed*

d. On the other hand, a "rigorous analysis" of whether underlying prerequisites are met may require Ct to address merits to some degree; ruling on class certification may have conclusive effect on claims of certain class members

Recommendation

e. Ct should identify each applicable prerequisite, identify facts in the record pertinent to each prerequisite, and articulate rationale for why facts support certification or not

§ 803.08(11)(a)

f. If Ct denies request for class certification, findings need not be made in writing

§ 803.08(11)(b)
Recommendation

But moving party is entitled to appeal as of right whether class certification granted or denied; written findings may aid Ct of Appeals

§ 803.08(3)(b)

7) Order certifying class must

a. Define class and class claims, issues, or defenses

b. Appoint class counsel

§ 803.08(11)(b)

8) Order granting or denying class-action certification or denying motion to decertify class action subject to interlocutory appeal as of right

a. Notice of appeal must be filed within 14 days

b. During pendency of appeal, all discovery and proceedings stayed

c. If case settles while on appeal, Ct retains jurisdiction to approve settlement

B. Prerequisites for all class actions

§ 803.08(1)(a)–(d)
Hammetter v Verisma Sys
2021 WI App 53, ¶ 7
399 Wis. 2d 211

1) Four prerequisites: numerosity, commonality, typicality, and adequacy

2) Numerosity

§ 803.08(1)(a)

a. Number of class members so numerous that joinder of all members is impracticable

Mulvania v Sheriff of Rock Island Cty
850 F3d 849, 859–60
(7th Cir. 2017)
Harwood v Wheaton Franciscan Servs, Inc
2019 WI App 53, ¶ 55
388 Wis. 2d 546

b. 40 class members generally considered sufficient

Chapman v Wagener Equities, Inc
747 F3d 489, 492
(7th Cir. 2014)

c. Exact number or identity of proposed class members need not be specified, as long as reasonable to believe class is large enough to make joinder impracticable

3) Commonality

§ 803.08(1)(b)

a. There are questions of law or fact common to class

Wal-Mart Stores, Inc v Dukes
131 S. Ct. 2541, 2551
(2011)

b. Are there issues central to validity of each member's claim that can be determined on a class-wide basis rather than litigating each claim separately?

Hammetter v Verisma Sys
2021 WI App 53, ¶ 11
399 Wis. 2d 211

c. E.g., members of proposed class allege same injury and claim damages based on same proof and governed by same statutes or legal theory

Hammetter v Verisma Sys
2021 WI App 53, ¶ 13
399 Wis. 2d 211

d. If liability can be determined on a class-wide basis, need for individual damages determinations does not rule out certification

4) Typicality

§ 803.08(1)(c)

a. Claims or defenses of proposed class representative are typical of claims or defenses of other class members

Hammetter v Verisma Sys
2021 WI App 53, ¶ 20
399 Wis. 2d 211

b. Test is not whether claims or defenses are identical but only whether they are typical

Hammetter v Verisma Sys
2021 WI App 53, ¶ 20
399 Wis. 2d 211

c. Test is whether proposed class representative's claims or defenses arise from same event or pattern of events or course of conduct or are based on same legal theory as claims of class as a whole, and ultimately have same "essential characteristics"

Koos v First Nat'l Bank of Peoria
496 F2d 1162, 1164
(7th Cir. 1974)

d. Typicality prerequisite not met if major focus of litigation will be on an issue unique to class representative

General Tel. Co. of SW v Falcon
102 S. Ct. 2364, 2370
n13 (1982)

e. Analyses of commonality and typicality prerequisites tend to merge

§ 803.08(7)
Hammetter v Verisma Sys
2021 WI App 53, ¶ 20
399 Wis. 2d 211

f. If within class there are subgroups of class members whose claims are typical of others within subgroup but distinct from claims of those in other subgroups, and if economies can be realized by litigating issues subgroup by subgroup, class may be divided into subclasses that are each treated as a class

5) Adequacy

§ 803.08(1)(d)

a. Class representative will fairly and adequately protect interests of class

Hammetter v Verisma Sys
2021 WI App 53, ¶ 21
399 Wis. 2d 211

b. Two criteria

- Whether interests of class representative or counsel are antagonistic to those of other class members

- Whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation

C. Additional prerequisites for certain class actions

1) In addition to four basic prerequisites identified in **Sec. 3.B.**, *supra*, movant must meet additional prerequisites, depending on type of class action

2) Sec. 803.08 identifies four types of class actions:

§ 803.08(2)(a)1.

a. Actions that, if otherwise pursued as separate actions, might subject Def to incompatible standards for future conduct

§ 803.08(2)(a)2.

b. Actions that, if otherwise pursued as separate actions, might substantially impair or impede interests of putative class members—for example, when there is a limited fund to distribute as damages

§ 803.08(2)(b)

c. Actions in which class seeks injunctive or declaratory relief but not damages

§ 803.08(2)(c)

d. All other class actions, if Ct finds that common questions of law or fact predominate over questions affecting only individual class members and if the superiority requirement in para. 4)b., *infra*, is met; these actions typically involve claims for compensatory damages

3) Most common type of class action is the last of these four, an action under § 803.08(2)(c)

4) In order to certify an action under § 803.08(2)(c), two additional prerequisites must be met

§ 803.08(2)(c)

a. Predominancy: whether common questions of fact or law predominate over individualized issues

Hammetter v Verisma Sys
2021 WI App 53, ¶¶ 8, 23
399 Wis. 2d 211

- Predominance may be found when all of class members' claims arise from common nucleus of operative facts and issues

b. Superiority: that class action is superior (in terms of fairness and efficiency) to adjudicating claims in separate actions

Harwood v Wheaton Franciscan Servs, Inc
2019 WI App 53, ¶ 58
388 Wis. 2d 546

- E.g., when individual amounts at issue are small and not likely to justify individual lawsuits

Hammetter v Verisma Sys
2021 WI App 53, ¶ 24
399 Wis. 2d 211

- E.g., if filing large numbers of individual cases would be burdensome for the Ct

§ 803.08(2)(c)

5) In considering whether predominancy and superiority prerequisites are met, Ct must consider four factors:

§ 803.08(2)(c)1.–4.

a. Class members' interests in individually controlling prosecution or defense of separate actions

b. Extent and nature of any litigation already begun by or against class members

c. Desirability or undesirability of concentrating litigation in the particular forum

d. Likely difficulties in managing a class action

4. Appoint Class Representatives and Class Counsel

§ 803.08(3)(b)

A. Order certifying class must appoint class counsel

§ 803.08(12)(e)

B. Class counsel must fairly and adequately represent interests of class

§ 803.08(12)(b)1.
Hammetter v Verisma Sys
2021 WI App 53, ¶ 21
399 Wis. 2d 211

C. In appointing class counsel, Ct must consider

1) Work done identifying or investigating potential class claims

2) Experience in handling class actions, other complex litigation, and types of claims asserted in action

3) Knowledge of applicable law

4) Resources counsel will commit to representing class

§ 803.08(12)(b)2.

D. In addition, Ct may consider any other matter pertinent to ability to fairly and adequately represent interests of class

§ 803.08(12)(c)

E. If more than one group of lawyers applies to serve as class counsel, Ct must approve group that is best able to represent interests of class

5. Ensure Notice to Class Members and Potential Class Members

A. Class members must be notified when

§ 803.08(4)(a), (b)
§ 803.08(11)(a)
§ 803.08(8)(a)2.

1) Ct certifies a class or modifies certification order

2) Ct proposes extent of the judgment

3) Ct deems appropriate to give class members opportunity to signify whether they consider representation fair and adequate

4) Class members may intervene and present claims or defenses

5) Ct imposes conditions on class representative or on intervenors

6) Ct orders that pleadings be amended to eliminate allegations about representation of absent persons

7) Ct deems notice appropriate at "any step in the action" or when "similar procedural matters" warrant

§ 803.08(9)(a)

8) Ct considers approval of a proposed settlement, voluntary dismissal, or compromise

§ 803.08(13)(a)

9) Ct considers approval of a claim for Atty fees or nontaxable costs

B. Notice standards

1) Class certification notice for an action under § 803.08(2)(c):

§ 803.08(4)(b)
Hammetter v
Verisma Sys
2021 WI App 53, ¶ 30
399 Wis. 2d 211

a. Must be "the best notice … practicable under the circumstances"

b. Perfection is not the standard, nor is actual notice required; individual notice should be given to all members who can be identified through reasonable effort

§ 803.08(4)(b)
Hammetter v
Verisma Sys
2021 WI App 53, ¶ 30
399 Wis. 2d 211

c. Class certification notice need not be given until class is certified

§ 803.08(4)(b)1.–7.

d. Notice must state clearly and concisely in plain, easily understood language:

- Nature of action
- Definition of class certified
- Class claims, issues, or defenses
- That class member may enter an appearance through Atty
- Ct will exclude any member who requests exclusion ("opt out")
- Time and manner for requesting exclusion
- Binding effect of a class judgment on members

§ 803.08(8)(a)2.
§ 803.08(9)(a)
§ 803.08(13)(a)

2) All other notices must be "appropriate" or "reasonable" in Ct's discretion

6. Approve Settlement

§ 803.08(9)

A. Claims may be settled only with Ct's approval

B. Procedure

§ 803.08(9)(a)

1) Direct notice to all class members who will be bound

§ 803.08(9)(c)

2) Parties seeking approval must disclose terms of settlement agreement

§ 803.08(9)(d)

3) In class action certified under § 803.08(2)(c), settlement and notice must afford class members new opportunity to opt out

§ 803.08(9)(b)

4) Convene a hearing

§ 803.08(9)(c)

5) Class member may object; objection may be withdrawn only with Ct's approval

C. Standards for approval

§ 803.08(9)(b)

1) If settlement is binding on class members, approve settlement only if it is fair, reasonable, and adequate

Synfuel Techs, Inc v
DHL Express (USA), Inc
463 F3d 646, 652
(7th Cir. 2006)

2) Ct must exercise high degree of vigilance in scrutinizing proposed settlement

Kaufman v American
Express Travel Related
Servs Co
877 F3d 276, 284
(7th Cir. 2017)

3) Ct should analyze strength of claims against amount offered in settlement, considering range and probabilities of possible outcomes

In re Subway Footlong
Sandwich Mktg. & Sales
Practices Litig
869 F3d 551, 555–57
(7th Cir. 2017)
see also In re Walgreen
Co Stockholder Litig
832 F3d 718, 724
(7th Cir. 2016)

4) Settlement that provides "meaningless relief" to class members while "enriching class counsel" and giving Def peace is not fair, reasonable, and adequate

7. Approve Atty Fees and Nontaxable Costs

A. Ct must approve claims for Atty fees and nontaxable costs if governed by settlement agreement or statute

B. Procedure

§ 803.08(13)(a)

1) Claim made by motion

§ 803.08(13)(a)

2) Direct notice to all parties and class members

§ 803.08(13)(b)

3) Class member or party from whom payment is sought may object

§ 803.08(13)(c)

4) Ct may hold a hearing

§ 803.08(13)(c)

5) Ct must find facts and state legal conclusions as if a trial to Ct under § 805.17(2)

§ 803.08(13)(d)

6) Ct may refer issues for determination by a referee, under § 805.06

C. Standards for approval

SCR 20:1.5(a)
Kolupar v Wilde Pontiac Cadillac, Inc
2004 WI 112
275 Wis. 2d 1
Bettendorf v Microsoft Corp
2010 WI App 13
323 Wis. 2d 137

See **CV 22, Sec. 1.D. (Atty Fees)**

8. Disburse Residual Settlement Funds

§ 803.08(10)(a)1.

A. "Residual funds" are unclaimed funds that remain after all class members have claimed their awards and after all expenses, litigation costs, Atty fees, and other Ct-approved disbursements have been made

§ 803.08(10)(b)1.

B. Order approving "judgment" or "compromise" that establishes a process for identifying and compensating class members also must provide for disbursement of residual funds

§ 803.08(10)(b)2.

Rule does not prohibit Ct from approving "settlement" that does not create residual funds

§ 803.08(10)(b)1.

C. Residual funds disbursed as follows:

1) Not less than 50% disbursed to WisTAF to support direct delivery of legal services to persons of limited means in non-criminal matters

2) Balance may be disbursed for purposes that have a direct or indirect relationship to objectives of underlying litigation

3) Or balance may be disbursed for purposes that otherwise promote substantive or procedural interests of class members